

FORM PTO-1595  
(Rev. 8-93)

RE

09-23-1998

OMB No. 0651-0011 (exp. 4/94)

Tab settings



SHEET

U.S. DEPARTMENT OF COMMERCE  
Patent and Trademark Office

SER 17

To the Honorable Commissioner of

100836215

attached original document or copy thereof.

1. Name of conveying party(ies): Innovative Hearing, Inc., Scott Swanson Enterprises, Inc., Jennifer Lorenzo, Scott Swanson

Additional name(s) of conveying party(ies) attached? ☐ Yes ☒ No

3. Nature of conveyance:

☐ Assignment☐ Merger☐ Security Agreement☐ Change of Name☒ Other Creditor's suit

Execution Date: August 27, 1998

2. Name and address of receiving party(ies)

Name: Gregg Hackett

Internal Address: \_\_\_\_\_

Street Address: 1525-B Farmers Lane

City: Santa Rosa State: CA ZIP: 95405

Additional name(s) & address(es) attached? ☒ Yes ☐ No

4. Application number(s) or patent number(s):

If this document is being filed together with a new application, the execution date of the application is: \_\_\_\_\_

A. Patent Application No.(s)

B. Patent No.(s)

1. 4,556,122 December 3, 1985  
2. 4,652,414 March 24, 1987

Additional numbers attached? ☐ Yes ☒ No

5. Name and address of party to whom correspondence concerning document should be mailed:

Name: Alexander B. Trueblood, Esq.

Internal Address: \_\_\_\_\_

Street Address: Chavez & Gertler LLP  
One Market Plaza, Steuart St. Tower, #1475

City: San Francisco State: CA ZIP: 94105

6. Total number of applications and patents involved: 2

7. Total fee (37 CFR 3.41).....\$80.00

☒ Enclosed☐ Authorized to be charged to deposit account

8. Deposit account number: \_\_\_\_\_

(Attach duplicate copy of this page if paying by deposit account)

DO NOT USE THIS SPACE

9. Statement and signature.

To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Alexander B. Trueblood

Name of Person Signing

[Signature]  
Signature

September 15, 1998

87

Total number of pages including cover sheet, attachments, and document: 87

Mail documents to be recorded with required cover sheet information to:  
Commissioner of Patents & Trademarks, Box Assignments  
Washington, D.C. 20231

PATENT

REEL: 9453 FRAME: 0857

Date

87

09/21/1998

01

PT 501

RECORDATION FORM COVER SHEET  
(Attachment)

2. Additional receiving Parties

Howard Hait  
78-848 Via Carmel  
La Quinta, CA 92253

Ronald Jenkins  
1534 Tennessee Street  
Vallejo, CA 94590

William Greg Davis  
7 San Anselmo  
Danville, CA 94506

Tom Williams  
235 Stageline Drive  
Vallejo, CA 94591

Myles Reisman  
486 North State Street  
Ukiah, CA 95482

JONATHAN E. GERTLER, ESQ. (S.B. NO. 111531)  
ALEXANDER B. TRUEBLOOD, ESQ. (S.B. NO. 150897)  
CHAVEZ & GERTLER LLP  
One Market Plaza  
Steuart Street Tower, Suite 1475  
San Francisco, CA 94105

Telephone: (415) 777-5515  
Facsimile: (415) 777-5343

Attorneys for Plaintiffs

FILED

AUG 27 1998

JOHN P. MONTGOMERY,  
Court Executive Officer  
MARIN COUNTY COURTS  
By: T. Olsen, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

GREGG HACKETT, HOWARD HAIT,  
RONALD JENKINS, WILLIAM G. DAVIS,  
TOM WILLIAMS, and MILES REISMAN,

Plaintiffs,

vs.

JENNIFER LORENZO, an individual,  
SCOTT SWANSON, an individual,  
INNOVATIVE HEARING, INC., a  
California corporation, SCOTT  
SWANSON ENTERPRISES, INC., a  
California corporation, and  
DOES 1 through 50, inclusive,

Defendants.

CASE NO. 174785

COMPLAINT FOR 1) SETTING ASIDE  
FRAUDULENT TRANSFER; 2)  
CONSPIRACY; 3) ACCOUNTING;  
4) CONSTRUCTIVE TRUST; 5)  
DECLARATORY RELIEF; 6) CREDITOR  
SUIT

Plaintiffs GREGG HACKETT, HOWARD HAIT, RONALD JENKINS,  
WILLIAM G. DAVIS, TOM WILLIAMS, MILES REISMAN, and MIKE BAILEY, allege  
as follows:

GENERAL ALLEGATIONS

1. Plaintiff GREGG HACKETT is an individual residing in the City of Santa Rosa, California.
2. Plaintiff HOWARD HAIT is an individual residing in the City of La Quinta, California.

1           3.     Plaintiff RONALD JENKINS is an individual residing in the City of  
2 Vallejo, Solano County, California.

3           4.     Plaintiff WILLIAM A. DAVIS is an individual residing in the City of  
4 Danville, California.

5           5.     Plaintiff TOM WILLIAMS is an individual residing in the City of Vallejo,  
6 Solano County, California.

7           6.     Plaintiff MILES REISMAN is an individual residing in the City of Ukiah,  
8 California.

9           7.     Plaintiffs are informed and believe, and thereon allege, that defendant  
10 JENNIFER LORENZO is an individual residing in Marin County, California.

11          8.     Defendant SCOTT SWANSON is an individual residing in Marin  
12 County, California.

13          9.     Plaintiffs are informed and believe that defendant SCOTT SWANSON  
14 ENTERPRISES, INC. is a California Corporation.

15          10.    Plaintiffs are informed and believe that defendant INNOVATIVE  
16 HEARING, INC. is a California Corporation which is not in good standing with the  
17 Department of Corporations.

18          11.    Plaintiffs are ignorant of the true names and capacities of defendants  
19 sued herein as Does 1 through 50, inclusive, and therefore sue these defendants  
20 by such fictitious names. Plaintiffs will amend this complaint to allege their true  
21 names and capacities when ascertained. Plaintiffs are informed and believe, and  
22 thereon allege, that each of the fictitiously-named defendants claims an interest in  
23 the property hereinafter described, and which is the subject of this action, or is  
24 responsible in some manner for the acts and omissions alleged herein.

25          12.    Plaintiffs are informed and believed, and thereon allege, that  
26 defendants, and each of them, who are the agents and employees of each and  
27 every other defendant, and in doing the things alleged herein, acted within the  
28 course and scope of said agency and employment.

OPERATIVE FACTS

**A. The Underlying Judgment**

13. At all times mentioned herein, plaintiffs have been the holders of certain claims against defendant Scott Swanson for fraud, breach of fiduciary duty, and other causes of action. These claims arose when Swanson misappropriated from plaintiffs certain patents and intellectual property rights concerning a hearing aid device called the Innovaid 600. The plaintiffs, a group of hearing aid dealers, had appointed Swanson to acquire the Innovaid for the group, but Swanson secretly and fraudulently acquired the Innovaid for himself.

14. In 1994, plaintiffs commenced a civil action against defendant Scott Swanson based on the aforementioned claims, in the Superior Court for the County of Los Angeles, Case No. 728196-7. The action was tried, and a unanimous jury rendered a verdict against defendant Scott Swanson on September 19, 1995, in the amount of \$304,000. The jury found Swanson liable, with clear and convincing evidence of malice, for fraud and breach of fiduciary duty. Judgment was entered on February 25, 1997, after a long delay during which the trial court was deciding certain equitable claims, and a true and correct copy of the judgment is attached hereto as Exhibit A. In July, 1998, the Court of Appeals, upon rehearing, affirmed the judgment in its entirety, except for approximately \$1,500 of costs, which were stricken from the judgment. A true and correct copy of the Court of Appeal's decision upon rehearing is attached hereto as Exhibit B, and made a part hereof.

15. Plaintiffs are still the owners of the above-mentioned judgment, of which only approximately \$12,000 has been satisfied, and upon which interest continues to accrue.

1           **B.     The Fraudulent Transfer of Scott Swanson Enterprises to**  
2           **Jennifer Lorenzo**

3           16.    Plaintiffs took Swanson's debtor examination in 1997. Swanson  
4           admitted under oath that in October, 1996, after the verdict in Hackett, et al. v.  
5           Swanson, he transferred his hearing aid business, known as Scott Swanson  
6           Enterprises, Inc., dba Advanced Instruments, to his live-in girlfriend, defendant  
7           Jennifer Lorenzo. Defendant Lorenzo is a high school graduate who was previously  
8           employed by Swanson as a part-time clerk, and who has virtually no experience in  
9           the hearing aid business, nor any hearing aid license. Swanson's hearing aid  
10          business was his only substantial asset that might satisfy plaintiffs' judgment.

11          17.    No money exchanged hands between Swanson and Lorenzo, although  
12          the purchase price for Scott Swanson Enterprises, Inc., dba Advanced Instruments,  
13          was \$80,000. Swanson testified at his debtor's examination that the "purchase  
14          price" consisted of Swanson receiving a \$1,000 "credit" for 80 months, on loans  
15          of \$80,000 he had taken from Scott Swanson Enterprises, Inc., just prior to the  
16          transfer to Lorenzo. The loans were undocumented, and the loan proceeds were  
17          used to pay money owed by Swanson to his attorneys who drafted the Swanson-  
18          Lorenzo fraudulent transfer agreement. In effect, Scott Swanson Enterprises, Inc.  
19          now pays itself back for loans which were used for Swanson's personal affairs, at  
20          the expense of judgment creditors. Defendant Lorenzo also signed an option  
21          agreement which allowed defendant Swanson to repurchase all stock in the  
22          corporation at the same price he paid for it. Swanson and Lorenzo entered into  
23          this transfer on or about October 14, 1996.

24          **C.     The Fraudulent Transfer of the Innovaid Patents**

25          18.    In the Spring of 1997, judgment creditors sought an injunction from  
26          the Alameda County Superior Court which would restrain Swanson from  
27          transferring any more assets during the pendency of a stay of execution on the  
28          judgment, and to allow Swanson to bring a new trial motion. About the time the

1 injunction was entered, through his wholly-owned and insolvent corporation called  
2 Innovative Hearing, Inc., Swanson purported to transfer all intellectual property  
3 concerning the Innovoid 600 hearing aid device (hereinafter, the "Innovoid  
4 Patents") to Scott Swanson Enterprises, Inc., for \$20,000. These were the same  
5 patents that Swanson had been found guilty of misappropriating from the plaintiffs.

6 19. The transfer of the patents has all the badges of fraud. It was  
7 effected to avoid the court's impending restraining order and plaintiffs' judgment.  
8 Scott Swanson Enterprises, Inc., dba Advanced Instruments, had already been  
9 using the Innovoid Patents (presumably under license from Innovative Hearing).  
10 Scott Swanson Enterprises, Inc. was Innovative Hearing's chief creditor.  
11 Nevertheless, Swanson and Lorenzo conspired to engineer a transfer wherein Scott  
12 Swanson Enterprises, Inc. "purchased" what it already had, from a company that  
13 owed it money. Once again, no real money changed hands between defendants  
14 Swanson and Lorenzo. The \$10,000 "down payment" check from Scott Swanson  
15 Enterprises, Inc. for the patents was sent directly to Swanson's attorneys, without  
16 being cashed by him. The remaining \$10,000 of the purported purchase price is  
17 not payable for five years. Swanson is also ostensibly entitled to \$250 per month,  
18 which is not paid by check, but (once again) is simply credited to the pre-transfer  
19 "loans" Scott Swanson took out from Scott Swanson Enterprises, Inc. to pay his  
20 attorneys.

21 **D. The Arrest of Swanson and Lorenzo for Conspiracy and**  
22 **Grand Theft**

23 20. Swanson's hearing aid license was revoked for fraud in October,  
24 1996, and Lorenzo has never had a hearing aid license, despite allegedly running  
25 Scott Swanson Enterprises, Inc., since Swanson lost his license. In August, 1997,  
26 the Alameda County District Attorney's Office executed a search warrant at the  
27 premises of Scott Swanson Enterprises, Inc. and at the Swanson/Lorenzo home,  
28 and seized documents.

1           21. On January 30, 1998, both Swanson and Lorenzo were arrested and  
2 charged with conspiring to defraud elderly customers of Advanced Instruments,  
3 practicing unlicensed hearing aid dispensing, and engaging in credit card fraud.  
4 Swanson was charged with numerous felony counts, including grand theft, fraud,  
5 and conspiracy. Lorenzo was charged with conspiring with Swanson to commit  
6 these crimes.

7           22. In approximately February, 1998, Swanson entered into a plea bargain  
8 and pled guilty. As part of the plea bargain, the charges against defendant Lorenzo  
9 were dropped. Attached hereto as Exhibit C is a true and correct copy of the  
10 "Affidavit in Support of Search Warrant" which details the facts supporting the  
11 action entitled People v. Swanson.

12           E.     **Jennifer Lorenzo's and Scott Swanson Enterprises, Inc.'s**  
13                   **Contempt of Court**

14           23. On August 29, 1997, defendant Jennifer Lorenzo individually and as a  
15 representative of Scott Swanson Enterprises, Inc., was ordered by the court to  
16 refrain from transferring any assets of Scott Swanson or Scott Swanson  
17 Enterprises, Inc. to any person. In defiance of that order, Lorenzo, acting for Scott  
18 Swanson Enterprises, Inc., transferred valuable equipment of Scott Swanson  
19 Enterprises, Inc. to an entity called Lori Medical Laboratories, Inc. on or about  
20 October 15, 1997, which had a value of at least \$50,000. A true and correct copy  
21 of the bill of sale and assignment signed by Lorenzo on behalf of Scott Swanson  
22 Enterprises, Inc. is attached hereto as Exhibit D. At the time of this transfer,  
23 plaintiffs had a lien on said property by virtue of Code of Civil Procedure §  
24 708.120(c).

25           24. The Alameda County Superior Court has issued an order to show  
26 cause for contempt against defendant Jennifer Lorenzo, in connection with her  
27 willful disobedience of the court's August 29, 1997 restraining order. The order to  
28 show cause for contempt will be heard on or about August 25, 1998, unless it is  
continued.



FIRST CAUSE OF ACTION  
(Transfer with Intent to Defraud -- Against All Defendants)  
(Cal. Civil Code 3439.04(a))

25. Plaintiffs incorporate by reference as though set forth fully herein each and every allegation of paragraphs 1 through 24 of this complaint.

26. At all relevant times, defendant Jennifer Lorenzo, willfully and intentionally conspired and schemed with defendant Swanson to receive ostensible title to Scott Swanson Enterprises, Inc., and to transfer the Innovaid Patents to Scott Swanson Enterprises, Inc., in order to ensure that this property would not be subject to the claims and judgment of plaintiffs and Swanson's other creditors.

Lorenzo, and Scott Swanson Enterprises, Inc. hold all the property referenced in this complaint for Swanson's sole benefit.

27. The transfers of title referenced in this complaint were made by defendants with an actual intent to hinder, delay, or defraud all of defendant Swanson's then and future creditors, including plaintiffs, in the collection of their claims, and are therefore voidable pursuant to C.C.P. § 3439, including C.C.P. § 3439.08(b).

28. Title to Scott Swanson Enterprises, Inc., and the Innovaid Patents, was received by defendants, with knowledge of plaintiffs' judgment, and with knowledge that Swanson and the other defendants intended to hinder, delay, or defraud Swanson's other creditors in the collection of their claims.

29. As a proximate result of defendants' wrongful acts, plaintiffs have been damaged in a sum exceeding \$100,000, and are entitled to a judgment against defendants for at least \$100,000 pursuant to C.C.P. § 3439 et seq, including C.C.P. § 3439.08.

30. The foregoing conduct by defendants was performed with oppression, fraud, or malice in conscious disregard of plaintiffs' rights, thereby justifying an award of punitive damages.

1                                    SECOND CAUSE OF ACTION  
2                                    (Conspiracy to Defraud -- Against All Defendants)

3            31.    Plaintiffs incorporate by reference as though set forth fully herein each  
4 and every allegation of paragraphs 1 through 30 of this complaint.

5            32.    Defendants willfully conspired between themselves to hinder, delay,  
6 and defraud plaintiffs in the collection of their claims against Swanson by causing  
7 the transfers referenced in this complaint.

8            33.    Defendants did the acts and things alleged herein pursuant to, and in  
9 furtherance of, the conspiracy alleged above.

10          34.    As a proximate result of defendants' wrongful acts, plaintiffs have  
11 been damaged in a sum exceeding \$100,000.

12          35.    The foregoing conduct by defendants was performed with oppression,  
13 fraud, or malice in conscious disregard of plaintiffs' rights, thereby justifying an  
14 award of punitive damages.

15                                    THIRD CAUSE OF ACTION  
16                                    (Accounting -- Against All Defendants)

17          36.    Plaintiffs incorporate by reference as though set forth fully herein,  
18 each and every allegation of paragraphs 1 through 35 of this complaint.

19          37.    Plaintiffs are informed and believe that defendants have collected and  
20 received rents, profits, or other income from the operation of Scott Swanson  
21 Enterprises, Inc., or through their ostensible ownership of the Innovaid Patents.  
22 Plaintiffs have demanded that defendants account for any and all such sums  
23 received, but defendants have failed to do so, and have refused to make an  
24 accounting.

25          38.    Plaintiffs are entitled to and hereby demand an accounting of and  
26 payment of all rents, profits, or other income received by defendants from the  
27 operation of Scott Swanson Enterprises, Inc. and/or defendants' ostensible  
28

ownership of the Innovoid Patents, during the period October, 1996 to the present, which amounts are estimated to exceed \$100,000.

**FOURTH CAUSE OF ACTION**  
(Constructive Trust -- Against All Defendants)  
(Cal. Civil Code § 2224)

39. Plaintiffs incorporate by reference, as though set forth fully herein, each and every allegation of paragraphs 1 through 38 of this complaint.

40. By virtue of their wrongful acts in defrauding plaintiffs and Swanson's other creditors, defendants hold Scott Swanson Enterprises, Inc., any monies, or property converted from the use or sale of Scott Swanson Enterprises, Inc., the Innovoid Patents, and any monies or property converted from the use or sale of the Innovoid Patents, as constructive trustees for plaintiffs' benefit.

**FIFTH CAUSE OF ACTION**  
(Declaratory Relief -- Against All Defendants)  
(Cal. Code of Civil Procedure § 1060)

41. Plaintiffs incorporate by reference as though set forth fully herein, each and every allegation of paragraphs 1 through 40 of this complaint.

42. An actual controversy exists between plaintiffs and defendants concerning their respective rights to Scott Swanson Enterprises, Inc., dba Advanced Instruments, and the Innovoid Patents. Plaintiffs claim a right to execute upon the property to satisfy their judgment, and to possess the property, whereas plaintiffs are informed and believe that defendants dispute that right based on their purported legal or equitable interest in said property.

43. Plaintiffs desire a judicial determination of their rights, which is necessary and appropriate under the circumstances. Plaintiffs desire a declaration that Lorenzo and the other defendants hold their purported interest in Scott Swanson Enterprises, Inc. and the Innovoid Patents for the benefit of Swanson, and that plaintiffs have a right to take possession of said property, and/or to execute on said property, and any monies or property converted by

1 defendants from the use or sale of said property, in order to satisfy their judgment  
2 in Hackett v. Swanson, et al., Superior Court Case No. 728196-7.

3 **SIXTH CAUSE OF ACTION**  
4 (Creditor's Suit -- Against All Defendants)  
(Code of Civil Procedure § 708.210)

5 44. Plaintiffs incorporate by reference as though set forth fully herein  
6 paragraphs 1 through 43 of this complaint.

7 45. Defendants Jennifer Lorenzo and Scott Swanson Enterprises, Inc. are  
8 third parties who have possession or control of property in which Scott Swanson,  
9 the judgment debtor, has an interest. Jennifer Lorenzo and Scott Swanson  
10 Enterprises, Inc. are also indebted to Scott Swanson and/or Innovative Hearing,  
11 Inc., in amounts to be determined, but at least \$90,000.

12 46. Plaintiffs are entitled to apply to the satisfaction of their judgment  
13 against Scott Swanson all of the property held by defendants for the benefit of  
14 Scott Swanson, and any debts owed by defendants to Scott Swanson.

15 47. Plaintiffs are entitled to an order against Jennifer Lorenzo and the  
16 other defendants, compelling them not to transfer any property held by them for  
17 the benefit of Scott Swanson until it can be levied upon, possessed, or otherwise  
18 applied to the satisfaction of plaintiffs' judgment.

19 48. At the time that defendants Lorenzo and Scott Swanson Enterprises,  
20 Inc. transferred assets of Scott Swanson Enterprises, Inc., dba Advanced  
21 Instruments, to Lori Labs, they were under a court order forbidding them from  
22 making such transfer. In addition, the property transferred to Lori Labs by was  
23 subject to a lien in favor of the judgment creditors at the time of the transfer.  
24 Accordingly, plaintiffs are entitled to a judgment against Jennifer Lorenzo and the  
25 other defendants in an amount exceeding \$100,000.

26 49. Plaintiffs are entitled to compensatory damages in an amount  
27 exceeding \$100,000.

28

1           50. Defendants acted with oppression, fraud, or malice in conscious  
2           disregard of plaintiffs' rights, thereby entitling plaintiffs to an award of punitive  
3           damages.

4           51. Plaintiffs are entitled to injunctive and/or equitable relief against  
5           defendants in the interest of justice as the court may order.

6           Wherefore, plaintiffs pray for judgment as follows:

7           1. That the transfers of the above-described property to Lorenzo or any  
8           other defendant be set aside and declared void, to the extent necessary to satisfy  
9           plaintiffs' original judgment of \$304,000, plus interest thereon of ten percent per  
10          annum;

11          2. That defendants be restrained from disposing or wasting the property  
12          described above;

13          3. That a temporary restraining order be granted to plaintiffs enjoining  
14          and restraining defendants and their representatives, attorneys, and agents from  
15          selling, transferring, conveying, assigning or otherwise disposing of any of the  
16          property described above;

17          4. That an order *pendente lite* be granted plaintiffs, enjoining and  
18          restraining defendants and their representatives, attorneys, servants, and agents  
19          from selling, transferring, conveying, assigning, or otherwise disposing of any of  
20          the property described above;

21          5. That the judgment herein be declared a lien on the property described  
22          above;

23          6. That an order be made declaring that defendants hold all of the  
24          property described above in trust for plaintiffs;

25          7. That defendants be required to account to plaintiffs for all profits and  
26          proceeds concerning the property described above;

27          8. For general damages in an amount of at least \$100,000 according to  
28          proof;

1 9. For punitive damages;

2 10. For costs of suit herein incurred and reasonable attorneys' fees of at  
3 least \$50,000;

4 11. For payment to plaintiffs of the amounts due from defendants as the  
5 result of any accounting, estimated to be at least \$100,000;

6 12. For an order compelling defendants to convey the above-described  
7 property to plaintiffs;

8 13. For a declaration that defendants hold their interest in the above-  
9 described property for the benefit of defendant Swanson, and that plaintiffs have a  
10 right to execute on said property, and any monies or property converted by  
11 defendants from the use or sale of the above described property;

12 14. That judgment be entered against defendants for the value of the  
13 assets transferred, pursuant to Code of Civil Procedure § 3439 et seq, including  
14 C.C.P. § 3439.08, which value exceeded \$100,000 at the time of the transfers.

15 15. For such other and further relief as the court may deem just and  
16 proper.

17 Dated: August 24, 1998

CHAVEZ & GERTLER LLP

18  
19 By: 

20 Alexander B. Trueblood  
21 Attorneys for Plaintiffs  
22  
23  
24  
25  
26  
27  
28

FEB 28 1997

ENTERED

FILED

FEB 28 1997

CLERK OF SUPERIOR COURT  
By A. J. J. J. J.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

GREGG HACKETT, et al.,

Plaintiffs,

vs.

SCOTT SWANSON, et al.,

Defendant.

NO. 728196-7

~~PROPOSED~~ JUDGMENT ON JURY  
VERDICT

This action came on regularly for trial on September 5, 6, 7, 11, 12, 13, 14, 18, and 19, 1995, in Department 14 of the Superior Court for the County of Alameda, the Honorable Ken Kawaichi presiding. The plaintiffs were represented by Chavez & Gertler LLP, by Jonathan E. Gertler. The defendants were represented by Harry Connick.

A jury of twelve persons was regularly empaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into Court with its verdict on September 19, 1995, as follows:

EXHIBIT A

**COPY**

PATENT

REEL: 9453 FRAME: 0871

1           **I. PLAINTIFFS' CLAIM OF BREACH OF A FIDUCIARY RELATIONSHIP**

2           1.     The defendant owed a fiduciary duty to the plaintiffs.

3           2.     Defendant breached a fiduciary duty to the plaintiffs.

4           3.     The defendant's breach of the fiduciary duty caused damage to  
5 plaintiffs Gregg Hackett, Howard Hait, Ronald Jenkins, William Davis, Tom  
6 Williams, and Myles Reisman.

7           4.     The total amount of all present and future damage suffered by each  
8 plaintiff as a result of the defendant's breach of fiduciary duty is as follows:

	<u>Present</u>	<u>Future</u>
9           Gregg Hackett:	\$ 25,000	\$ 11,000
10          Howard Hait:	\$ 47,000	\$ 50,000
11          Ronald Jenkins	\$ 51,000	\$ 22,000
12          William Davis	\$ 37,000	\$ 16,000
13          Tom Williams	\$ 4,000	\$ 2,000
14          Myles Reisman	<u>\$ 25,000</u>	<u>\$ 12,000</u>
15          Total	\$ 189,000	\$ 113,000

16                   **II. PLAINTIFFS' CLAIMS OF FRAUD**

17           **A.     Plaintiffs' Claims of Fraud by Concealment**

18           1.     The defendant concealed or suppressed a material fact.

19           2.     The defendant intentionally concealed or suppressed a material fact  
20 with the intent to defraud the plaintiff.

21           3.     The plaintiffs were not aware of any material facts concealed or  
22 suppressed by the defendant at the time plaintiffs acted or failed to act.

23           4.     If plaintiffs had known of the concealed or suppressed facts, they  
24 would not have acted or failed to act in the way they did act or fail to act.

25           5.     Defendant's concealment or suppression of a material fact caused  
26 plaintiffs damage.

27           6.     The total amount of all present and future damage suffered by the  
28 plaintiffs and caused by defendant's concealment or suppression of material facts  
is as follows:

///



	<u>Present</u>	<u>Future</u>
Gregg Hackett:	\$ 25,000	\$ 11,000
Howard Hait:	\$ 47,000	\$ 50,000
Ronald Jenkins	\$ 51,000	\$ 22,000
William Davis	\$ 37,000	\$ 16,000
Tom Williams	\$ 4,000	\$ 2,000
Myles Reisman	<u>\$ 25,000</u>	<u>\$ 12,000</u>
Total	\$ 189,000	\$ 113,000

**B. Plaintiffs' Claims of Fraud Based On False Promise**

1. The defendant made a promise as to a material matter.
2. At the time defendant made the promise, the defendant intended to perform it.

**C. Plaintiffs' Claims of Fraud Based On Intentional Misrepresentation**

1. The defendant made a representation as to a past or existing material fact.
2. The defendant's representation was false.
3. The defendant knew that the representation was false when he made it.
4. The defendant made the representation with the intent to defraud the plaintiffs.
5. The plaintiffs were not aware of the falsity of the defendant's representation.
6. The plaintiffs acted or failed to act in reliance upon the truth of the defendant's representation.
7. The plaintiffs were justified in relying upon the defendant's representation.
8. The defendant's misrepresentation caused the plaintiffs damage.
9. The total amount of all damage suffered by the plaintiffs and caused by the reliance upon the truth of the defendant's representation was as follows:

///

///

	<u>Present</u>	<u>Future</u>
Gregg Hackett:	\$ 25,000	\$ 11,000
Howard Hait:	\$ 47,000	\$ 50,000
Ronald Jenkins	\$ 51,000	\$ 22,000
William Davis	\$ 37,000	\$ 16,000
Tom Williams	\$ 4,000	\$ 2,000
Myles Reisman	<u>\$ 25,000</u>	<u>\$ 12,000</u>
Total	\$ 189,000	\$ 113,000

### III. DEFENDANT'S STATE OF MIND

1. By clear and convincing evidence, the defendant acted with fraud or malice in the conduct upon which its liability in this action is based.

### IV. DEFENDANT AND CROSS-COMPLAINANT SCOTT SWANSON'S CLAIM OF LIBEL AGAINST PLAINTIFF AND CROSS-DEFENDANT HOWARD HAIT

1. Plaintiff and cross-defendant Howard Hait did not publish by writing a false and unprivileged defamatory statement regarding defendant and cross-complainant Scott Swanson.

### V. CROSS-COMPLAINANT SCOTT SWANSON'S CLAIM OF INTENTIONAL MISREPRESENTATION AGAINST CROSS-DEFENDANT HOWARD HAIT

1. Plaintiff and cross-defendant Howard Hait did not make a misrepresentation as to a past or an existing material fact.

It appearing by reason of said verdict that plaintiffs, and each of them, are entitled to judgment against defendant Scott Swanson,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs shall have and recover from defendant Scott Swanson \$302,000 in damages apportioned as follows, with interest thereon at the rate of ten percent (10%) per annum from the date of entry of this judgment until paid and, in addition, costs and disbursements recoverable pursuant to Code of Civil Procedure §§1032 and 1033.5;

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PLAINTIFF

DAMAGES AWARDED

Gregg Hackett	\$ 36,000
Howard Hait	\$ 97,000
Ronald Jenkins	\$ 73,000
William G. Davis	\$ 53,000
Tom Williams	\$ 6,000
Miles Reisman	\$ 37,000

2. Defendant and cross-complainant Scott Swanson shall take nothing by way of his cross-complaint for libel and intentional misrepresentation against plaintiff and cross-defendant Howard Hait.

Dated: FEB 21 1997, 1997

KEN KAWAUCH

JUDGE OF THE SUPERIOR COURT

HACKETT\PLEADING\VERDICT.JUD

NOT TO BE PUBLISHED IN OFFICIAL REPORTS  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT

JUL 30 1998

DIVISION THREE

FILED  
CLERK OF COURT  
JUL 30 1998

GREGG HACKETT et al.,  
Plaintiffs and Respondents,  
v.  
SCOTT SWANSON et al.,  
Defendants and Appellants.

RON D. BARNOW, CLERK  
BY  
A078559 & A078590  
(Alameda County  
Super. Ct. No. 728196-7)

Plaintiffs, owners of several hearing aid businesses, sued defendants Scott Swanson and Innovative Hearing, Inc. (Innovative Hearing) in tort. A jury returned a verdict in plaintiffs' favor for over \$300,000 in damages, and the court awarded costs. Defendants appeal from the judgment (A078559) and from the order denying their motion to tax costs (A078590). The appeals are hereby consolidated. We affirm.

### Facts

Advanced Instruments is a loosely associated group of hearing aid dealers founded by Howard Hait, who brought each of the other plaintiffs and Swanson into the business. Hait trained these individuals, then sold them the rights to dispense hearing aids in a particular region of the Bay Area. Each of the individual businesses remained part of Advanced Instruments for purposes of advertising and service support. In March 1993, Advanced Instruments consisted of approximately 18 offices and 13 to 15 individual dealers. At that time, Norm Schlaegel was the owner of Innovative Hearing, the manufacturer of the Innovaid 600, an acoustic hearing aid. The Innovaid 600, which was suitable only for those with mild hearing loss, was the most inexpensive model sold by Advanced Instruments.

EXHIBIT B

Advanced Instruments began selling the Innovaid 600 in 1986, and it proved to be an excellent marketing tool. Individuals who were reluctant to address potential hearing loss were attracted by the possibility of a low cost product to remedy what they judged to be mild impairment. However, when a new customer came into an Advanced Instruments office, they were tested to determine the degree of any hearing loss. Often a customer who was attracted by advertising for the Innovaid 600 was actually in need of a more powerful and, consequently, more expensive device. Advertising for the Innovaid 600 was done mostly in newspapers and by direct mail. During his 30 years in the business, Hait had "never seen an ad that got the response that this product would get." He estimated the response to Innovaid 600 ads was "four to five times the response that we would get with any other device." An increased response led to an increase in the number of hearing tests, which in turn led to an increase in sales of all Advanced Instrument products.<sup>1</sup>

The members of Advanced Instruments met on March 16, 1993, to consider a television advertising campaign. All agreed that the Innovaid 600 would be the focus of the campaign and that, in order to make the large investment required for television advertising worthwhile, they would need to secure private labeling rights to the Innovaid 600. At that time, Advanced Instruments had a nonexclusive dispensing contract with Innovative Hearing that was terminable on 30 days' notice. Private labeling rights would

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<sup>1</sup> Hait estimated he sold a hearing aid to 30 or 40 percent of customers. Consequently, an increase in the number of customers drawn to the business would increase sales proportionally. According to plaintiff Robert Reisman, "[The Innovaid 600] brought people in, and that's the hardest to do in our business." Reisman's gross sales after he began advertising the Innovaid 600 were "[s]ometimes double." According to plaintiff William Davis, "... the quality of person that comes in, the quality -- in other words, the close ratio, you might say, the quality people that come in on an Innovaid ad seem to be better for some reason. It's a more efficient, you might say, type of ad." According to plaintiff Greg Hackett, "[The Innovaid 600] brought more people in my door than any other product or service that I had ever done previously." Plaintiff Ronald Jenkins did not open his own office until December 1992. However, he did very well using the Innovaid 600 as part of his advertising before his right to do so was terminated. Plaintiff Tom Williams found enormous success when advertising the Innovaid 600 in 1987. Although he had not used it since then, he was planning to participate in the proposed television campaign.

have permitted them to advertise and sell the product under the Advanced Instruments name. Thus, a potential customer who learned of the product through their advertising would not go to a competitor to purchase it. Swanson volunteered to approach Norm Schlaegel, on behalf of the group, about acquiring private labeling rights for the Innovaid 600.

Schlaegel turned down Swanson's request for private labeling rights. Shortly thereafter, acting individually, Swanson bought Innovative Hearing through a broker for \$52,500. Schlaegel testified that the broker initially did not identify the prospective buyer. He also testified that he would have been willing to sell the business to Advanced Instruments. Two plaintiffs testified that Advanced Instruments would have been willing to buy Innovative Hearing.

Swanson then sent plaintiffs the following letter: "This letter is to inform you that Innovative Hearing, Inc. has been purchased by Scott Swanson. As of June 1, 1993, rights to the Innovaid will be sectioned in territories. [¶] Mr. Swanson would like to give you the first opportunity at having the rights to sell and advertise the Innovaid so that no one else can compete in your territory. [¶] If you would like to take advantage of this opportunity, please call his secretary to set up an appointment to discuss the details." Swanson changed the terms under which plaintiffs were able to sell the Innovaid 600. To secure sales rights for the Innovaid 600, plaintiffs had to carry and promote other products Swanson would be distributing under the Innovative Hearing label. Swanson also required an initial payment of \$3,000. Previously, Schlaegel had not charged plaintiffs for the right to sell the Innovaid 600. Swanson insisted upon reviewing all advertising using the Innovaid 600. Choosing not to deal with Swanson, plaintiffs relinquished the ability to market the Innovaid 600. As a consequence, their sales volume

suffered.<sup>2</sup> Plaintiffs used other forms of marketing or business practices in an attempt to offset their losses.<sup>3</sup>

Ken Baggott, the advertising consultant who advised Advanced Instruments on the television campaign, testified at trial. He opined that the Bay Area market had enormous potential for expansion in hearing aid sales, justifying a television campaign. When asked why he believed Advanced Instruments had the potential of dramatically increasing its profits with the television campaign, Baggott responded: "Because most businesses are further along in their marketing strategy than this particular group was. An auto dealer, for example, already uses television and major market newspapers to get his clients. And that is the best quality advertising you can buy. [¶] My clients, the Advanced Instrument gentlemen were not using those sorts of medias. They were using secondary media which is much less efficient. So until this point, in my opinion, they were getting very little bang for their advertising dollar. And that was why their advertising costs were so high. . . . [¶] So suddenly we were going to go on line with major market media, something they had never experienced before. And they were going to take a quantum jump. They were going to go from \$200,000 a year in sales to 400 or 500 a year in sales. [¶] Now in year number two they weren't going to get the same

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<sup>2</sup> According to Howard Hait, he sold 50 units per month in 1992. That year, gross sales receipts were \$877,000. His sales dropped to approximately 40 units per month in 1993, after his right to sell Innovaid 600 was terminated. Gross receipts fell to \$649,000. Sales dropped to 30 units per month in 1994. Hait also lost an opportunity to sell another business interest in Advanced Systems when the prospective buyer learned that the right to sell Innovaid 600 had been terminated. Reisman's unit sales fell from 304 in 1992 to 156 in 1994. Davis's unit sales fell from 228 in 1992, to 207 in 1993, to 122 in 1994. Hackett's net profit fell from \$56,000 in 1992 to \$39,000 in 1993. In 1993, Jenkins's first quarter net profit was \$21,000 and, for the remaining three quarters, \$30,000.

<sup>3</sup> Hait arranged a deal with another manufacturer to buy below wholesale. He also developed a factory to manufacture his own hearing aids, and he bought another office to supplement his income. Reisman tried several other promotions that did not work very well. Davis spent \$13,000 on an alternative advertising campaign that did not produce adequate sales. In 1994, new technology allowed him to introduce a new audio device. Consequently, his gross sales level that year exceeded that of 1992. Hackett gave more educational talks and made more visits to senior centers in order to produce business. In 1994, his profits returned to their 1992 level, after the introduction of a higher priced item. Jenkins attempted other advertising, visited senior centers, and conducted educational talks.

increase, but in year number one they were going to get a huge jump in my opinion by virtue of using a medium they hadn't had access to before."

### **Procedural History**

Plaintiffs sued defendants for damages arising from breach of fiduciary duty, misrepresentation, and fraud. They also sought imposition of a constructive trust, a preliminary injunction, declaratory relief, and an accounting.<sup>4</sup> Swanson cross-complained for defamation, fraud, and misrepresentation. The jury found by special verdict that Swanson had breached a fiduciary duty to plaintiffs and had committed fraud by both concealment and misrepresentation. The jury awarded compensatory damages to plaintiffs as follows: Hackett, \$25,000 in present damages and \$11,000 in future damages; Hait, \$47,000 and \$50,000; Jenkins, \$51,000 and \$22,000; Davis, \$37,000 and \$16,000; Williams, \$4,000 and \$2,000; and Reisman, \$25,000 and \$12,000. The jury also determined that Swanson acted with fraud or malice. Finally, the jury found in favor of plaintiffs on Swanson's cross-complaint.

After the jury returned its special verdict on September 19, 1995, the case was recessed until September 25 for trial of the punitive damages claim and equitable remedies. During this time, defendants' trial counsel, Harry Connick, advised Swanson that he was moving out of the state and that defendants should obtain new counsel. Defendants moved for a mistrial, claiming they had been abandoned by their lawyer. In a subsequent phone call from Alabama, Connick informed the court that he had resigned from the State Bar after the jury rendered its special verdict. According to Connick, Swanson was aware long before trial of Connick's plans to move to Alabama in mid-September. Connick believed that Swanson would be obtaining a new attorney or possibly representing himself in the remainder of the case. The court was later informed by the State Bar that, at the time of his resignation, a disciplinary investigation was

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<sup>4</sup> There were originally eight plaintiffs; however, Dan Rotholz and Mike Bailey were dismissed at their request.



pending against Connick, though no formal charges had been brought. The court denied the motion for mistrial in exchange for dismissal of plaintiffs' claim for punitive damages.

The court issued a temporary order restraining Swanson from taking "steps to derogate the rights of the plaintiffs to private-label Innovaid 600." However, the order was not to take effect until plaintiffs posted a \$52,500 bond, reflecting the price of Innovative Hearing. Defendants contend, and plaintiffs do not dispute, that no bond was ever posted. Although the record is unclear, defendants contend that plaintiffs ultimately dismissed their equitable claims. Plaintiffs do not contend otherwise.

Defendants requested a new trial, alleging, inter alia, that they had been abandoned by Connick midtrial and that Connick's representation had been ineffective. The motion was denied. Plaintiffs moved for \$8,700.22 in costs. Defendants moved to tax costs relating to a trial transcript that had not been ordered by the court. The motion to tax costs was denied as well.

Defendants appeal from the judgment and from denial of their motion to tax costs.

## **Discussion**

### **I. Mitigation of Damages**

Defendants contend that, to the extent plaintiffs' claimed injury consisted of the lost opportunity to sell the Innovaid 600, plaintiffs failed to mitigate damages when they refused Swanson's offer to continue selling the product.<sup>5</sup> "A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures. . . . [¶] The doctrine does not require the injured party to take measures which are unreasonable or impractical or which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial

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<sup>5</sup> Defendants' briefing is somewhat confusing on this point. Defendants argue that plaintiffs failed to prove damages, that they failed to prove causation, and that they breached their duty to mitigate. We agree with plaintiffs that the essence of defendants' claim is that plaintiffs could have mitigated their damages by continuing to sell the Innovaid 600 under Swanson's terms.

means. [Citations.] The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. [Citations.] The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. . . . The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. [Citations.]" (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396-397.) "Mitigation of damages in tort cases is restricted by principles of equity . . . ." (*Dakota Gardens Apartment Investors "B" v. Pudwill* (1977) 75 Cal.App.3d 346, 352.) The doctrine of mitigation is used sparingly in the commercial context. (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691.) "Failure to mitigate damages, however, is a matter of affirmative defense that must be pleaded and proved by [defendants]. [Citation.]" (*Mayes v. Sturdy Northern Sales, Inc.* (1979) 91 Cal.App.3d 69, 86; disapproved on another ground in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal 4th 503, 521, fn. 10.) "The question of whether the injured party has acted reasonably in mitigating damages is one of fact. [Citation.]" (*Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 239.)

Thus, it was defendants' burden to prove that plaintiffs had failed to reasonably mitigate damages. The jury was not specifically instructed on mitigation, nor was it asked as part of its special verdict to make a finding on that issue. Defendants bore the burden of requesting such an instruction or finding. (See *Morris v. Frudenberg* (1982) 135 Cal.App.3d 23, 32-35.) Therefore, we must assume that the jury determined that defendants had failed to prove that plaintiffs had acted unreasonably. On appeal, we must determine only whether such an implicit determination is supported by substantial evidence. (See *Sackett v. Spindler, supra*, 248 Cal.App.2d at p. 239.) On the facts before us, equity did not require plaintiffs to accept Swanson's offer to continue selling the Innovaid 600. Swanson imposed new terms on the right to sell the product, including his

right to review all advertising, an obligation to carry and promote other products, and an initial \$3,000 payment. Additionally, under the circumstances, plaintiffs were not required to continue their professional relationship with Swanson in order to mitigate damages resulting from Swanson's fraudulent behavior.

## **II. Loss of Business Opportunity**

Swanson also contends that, to the extent plaintiffs' claimed injury consisted of the lost opportunity to purchase Innovative Hearing themselves, plaintiffs failed to prove they were ready, willing, and able to do so, as is required by the corporate opportunity doctrine.<sup>6</sup> Under the corporate opportunity doctrine, a fiduciary may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy: "... a corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." (*Kelegian v. Mgrdichian* (1995) 33 Cal.App.4th 982, 988.) Whether a corporate opportunity exists is primarily a question of fact. (*Id.* at p. 989.) Applying a deferential standard of review, we conclude there was substantial evidence that plaintiffs were ready, willing, and able to purchase Innovative Hearing. Hackett testified: "I felt that if [Swanson] had come back to the group and said [Schlaegel] is not willing to private label the Innovative product but he's willing to sell the company, there's not a doubt in my mind we would have jumped at the chance to purchase the company which would therefore give us private label rights." Davis testified of Innovative Hearing: "I had no idea it was for sale. I would have bought it." Additionally, Advanced Instruments was willing to spend \$20,000 a month on Baggott's advertising campaign. By comparison, the cost of acquiring all rights to its lead product was not prohibitive. Defendants presented no evidence that Advanced Instruments would not have been willing or able to purchase Innovative Hearing. In fact, Swanson's failure

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<sup>6</sup> "While it has been applied so generally in corporation cases as to have become known as the doctrine of corporate opportunity it is founded in the doctrine of loyalty in business which applies in all situations in which trust is reposed. [Citations.]" (*MacIsaac v. Pozzo* (1947) 81 Cal.App.2d 278, 285.)

to inform the group that the business was for sale suggests he believed the group would want to buy it. We also note that defendants never argued this point below to either the court or the jury.<sup>7</sup>

### III. Standing

Defendants argue that plaintiffs lacked standing to sue because they constituted only some members of a joint venture. Defendants argue that plaintiffs should have either sued on behalf of the joint venture or sought the joinder of all members of the joint venture.<sup>8</sup> Curiously, both at trial and at another point in their opening brief on appeal, defendants argued that Advanced Instruments was not a joint venture. Now, they contend to the contrary. Essentially, defendants argue that plaintiffs' pleading was defective. They did not raise this contention by way of a demurrer or motion for judgment on the pleadings. Defendants' answer to plaintiffs' complaint reads in part: "BY WAY OF A SIXTEENTH AFFIRMATIVE DEFENSE, THESE ANSWERING DEFENDANTS ALLEGE THAT plaintiffs, and each of them, have failed to join necessary and/or indispensable parties to the within action pursuant to Code of Civil Procedure § 389 and the complaint should therefore be dismissed." The appellate record contains no separate motion to dismiss, alleging the foregoing ground or indeed any ground for dismissal. To the extent defendants' answer was in part a motion to dismiss, the appellate record contains no evidence of a ruling by the trial court. A defect in the joinder of parties may not be raised for the first time on appeal. (See *Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 369.) Assuming arguendo that Swanson properly raised this issue in the trial court, he failed to secure a ruling or otherwise perfect the record for appeal.

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<sup>7</sup> In support of their contention that Advanced Instruments was unable to buy Innovative Hearing for \$52,500, defendants point to plaintiffs' failure to post the \$52,500 bond required by the court before the temporary order restraining Swanson from alienating rights to the Innovaaid 600 would take effect. We find no necessary correlation between the two events.

<sup>8</sup> Defendants do not contend that the joint venture itself should have been named as a party.

#### IV. Bait and Switch

Defendants contend that advertising of the Innovaid 600 by members of Advanced Instruments, including Swanson himself, was an illegal bait-and-switch scheme in violation of Business and Professions Code sections 17200 and 17500. Defendants further contend that any recovery for plaintiffs was barred by the principle that the courts may not enforce such an illegal transaction. (See *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109-1111.) In their briefs on appeal, the parties agreed that whether the advertising plan employed here was a bait and switch scheme is a question of fact. "What constitutes 'unfair competition' or 'unfair or fraudulent business practice' under any given set of circumstances is a question of fact, the essential test being whether the public is likely to be deceived [citation]. Unfair competition means and includes unfair or fraudulent business practice and unfair, untrue or misleading advertising and any act denounced by Business and Professions Code sections 17500-17531 [citation]." (*Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 856.)

Defendants did not plead illegality as an affirmative defense, nor did they argue this defense at trial. The jury received no instruction on this defense and, consequently, made no finding in its special verdict. Defendants did raise this contention on their motion for new trial. The court denied the motion, finding that no bait-and-switch scheme occurred. Swanson asks this court to find that Advanced Instruments' use of the Innovaid 600 was an illegal bait and switch scheme. In our initial opinion, we declined to do so, finding that the issue had been waived because not raised at trial. We granted rehearing to allow the parties to fully brief the question of waiver. We now affirm our original conclusion that defendants waived the question of illegality by not raising it in a timely fashion.

Illegality is an affirmative defense that must be specially pleaded by a defendant, unless the illegality clearly appears on the face of the complaint. (*Gelb v. Benjamin* (1947) 78 Cal.App.2d 881, 884; accord *Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96-

97 [The existence of an employer-employee relationship, sufficient to limit recovery to worker's compensation provisions, must appear on the face of the complaint or be specially pleaded.] Defendants rely upon *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 148, in which the court stated that the question of illegality may be raised for the first time at a motion for new trial or on appeal. However, the Supreme Court later characterized that statement as dictum because, in *Lewis & Queen*, the question of legality was raised at trial. (*Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 166.) In *Fomco*, the court held that a defendant could not make a motion for new trial on the basis of newly discovered evidence of illegality when no evidence of illegality had been presented at trial and when the defendant had failed to show diligence in obtaining the new evidence. (*Ibid.*)

The only case supporting defendants' contention is *LaFortune v. Ebie* (1972) 26 Cal.App.3d 72, in which the plaintiff recovered damages for intentional interference with an advantageous business relationship based on a franchise contract. The appellate court considered the question of the contract's illegality for the first time on appeal. However, in so doing, the court relied upon the dictum found in *Lewis & Queen v. N. M. Ball Sons*, *supra*, 48 Cal.2d at page 148. The court recognized that critical factual determinations on the question of illegality remained unexplored and, so, remanded the matter for a new trial. We decline to follow *LaFortune v. Ebie* on this point.

When the question of illegality is purely a legal one, no practical considerations prevent the trial court from considering the question for the first time at a motion for new trial. Similarly, no practical considerations prevent an appellate court from considering the question when it is raised for the first time on appeal. However, where the question of illegality turns on the resolution of factual disputes, a party cannot wait to raise the question for the first time on appeal. A contrary rule would only foster gamesmanship. A defendant, loath to assert before the jury that it had been party to an allegedly illegal enterprise, could take his chances on a favorable verdict. If such a verdict were not

forthcoming, the defendant could then raise illegality for the first time and obtain a new trial. We do not suggest that defendants here engaged in such gamesmanship, only that a rule conducive thereto would not be a wise one. Of course, if a defendant could demonstrate that he was unaware at trial of those facts supporting a defense of illegality and otherwise was diligent in their discovery, he might have a meritorious motion for new trial. (See *Fomco, Inc. v. Joe Maggio, Inc.*, *supra*, 55 Cal.2d at p. 166.) Defendants make no such allegation here.

Defendants contend that the question of illegality is one of law that may not be determined by the jury. However, when the sole determination on the question of illegality is one of fact, the question of illegality may indeed be resolved by the jury. (See *Marshall v. LaBoi* (1954) 125 Cal.App.2d 253, 271-272.) Defendants also contend that the foregoing authority is distinguishable because, in this case, the question of illegality was considered by the trial court at the motion for new trial. The trial court did consider the question of illegality and found against defendants on this point. However, the court's consideration of that question does not obviate defendants' failure to raise the question properly. Indeed, it would likely have been an abuse of discretion for the trial court to grant a new trial on this point. *Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, relied upon by defendants, is distinguishable. There, the appellate court reversed a judgment based upon evidence of juror misconduct first presented at a motion for new trial. By definition, this evidence could not have been presented at trial. Secondly, the question of juror misconduct is always one for the court.

At trial, plaintiffs had no notice that defendants would raise a defense of illegality. Consequently, plaintiffs did not have the opportunity to fully litigate this question. "... [I]f the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal. [Citations.]" (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.) Whether a particular enterprise is a bait-and-switch scheme

turns on the factual question of whether the public is likely to be deceived. Consequently, defendants waived this issue by not raising it at trial.

### V. Expert Testimony

Defendants contend Ken Baggott was not qualified as an expert to opine as to whether the advertising plan used by Advanced Instruments was a bait and switch scheme or as to what profits plaintiffs would have realized from a television campaign. As to the former subject, no objection was raised at trial. Consequently, any potential error is waived. We also note that, given that defendants did not argue and did not ask that the jury be instructed on the subject of bait and switch, any error occasioned by Baggott's opinion on this subject was harmless. As to the latter subject, defense counsel initially objected but later apparently withdrew his objection. Nonetheless, we conclude the testimony of Baggott as to the potential profitability of the advertising campaign was properly received.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) "The party offering the expert must demonstrate that the expert's knowledge of the subject is sufficient, and the determinative issue in each case is whether the witness has sufficient skill or experience in the field so his testimony would be likely to assist the jury in the search for the truth." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 219.) " 'The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 771, 813.)

Baggott did not profess to have experience in the hearing aid industry before his involvement with the Advanced Instruments group. However, he had been in advertising for nearly 30 years, assisting mostly small chain retail stores and franchise groups. He researched trade publications and determined that the average sale in the hearing aid



industry was approximately \$2,000. Baggott relied on his own experience with other clients serving a similar age group (e.g., funeral services and hospital beds) to determine a reasonable cost for every lead generated by the advertising. He also determined, through a combination of his own experience and research in the hearing aid industry, that Advanced Instruments could expect to sell a hearing aid to one out of every four potential customers attracted by the advertising campaign. He also advised that any television commercial be broadcast between 9 a.m. and 4 p.m., when the audience for a "seniors product" was at its highest. He opined that such a commercial would reach 50,000 consumers over the age of 65, among whom hearing loss was most likely.

We find no abuse of discretion in the trial court's implicit determination that the foregoing testimony could assist the jury in determining the potential profitability of a television advertising campaign for the members of Advanced Instruments.

#### **VI. Award of Damages**

Defendants argue that, because the television campaign was a new business venture, the damages awarded were speculative. They rely upon *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697-1698: " 'Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision. [Citations.]' [Citation.] However, '[i]t has been frequently stated that if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage. [Citations.]' However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty *both* their *occurrence* and the *extent* thereof. [Citations.] In the present case the question is whether the evidence of loss of prospective profits meets that standard.' [Citation.] Unestablished

businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market. [Citations.]” (Italics in original.)

First, we cannot agree with defendants that the matter before us involves a new business. All but one of the plaintiffs and Swanson had been operating their hearing aid businesses for many years. Profit projections were derived from Advanced Instruments’s established pattern of earnings when using Innovaid 600 as a marketing tool. In assessing damages, the only *new* aspect with which the jury was concerned here was the ability of a television advertising campaign to generate leads. Baggott provided expert testimony on this point, relying in part upon industry statistics demonstrating the success rate of television advertising in the hearing aid industry on a national scale. Thus, the facts before this jury were far different than those in *Resort Video, Ltd. v. Laser Video, Inc.*, *supra*, 35 Cal.App.4th 1679. In that case, the plaintiff formed a business for the purpose of producing video presentations of vacation hotels on laser discs for use by travel agents. The plaintiff employed 3M to produce the discs for Caribbean resorts and the defendant to produce the discs for Mexican resorts. The plaintiff planned to sell participation in the program to resorts in return for \$10,000 in room credits. The defendant made only partial delivery of discs, which were of inferior quality. The plaintiff was unable to recover, and the business closed. However, credits from the resorts were due only as the plaintiff signed specified numbers of participating travel agents. At the time of the defendant’s breach, the plaintiff had signed only a small number of travel agents. Under an alternate program, the plaintiff intended to receive commissions from representatives who would, in turn, market the product to travel agents. At the time of the breach, the plaintiff had commitments from less than half of the projected number of representatives. Additionally, there appeared to be little demand for room credits the plaintiff had already earned. (*Id.* at pp. 1685-1689.) After the jury awarded the plaintiff \$975,000 in damages, the trial court granted a new trial on the ground that there was insufficient evidence of

damages to justify the award. (*Id.* at pp. 1689-1690.) The appellate court upheld that exercise of the court's discretion. (*Id.* at p. 1701.) In short, the plaintiff had never experienced profits, and its ability to do so, absent the defendant's default, was speculative.

Defendants also contend that plaintiffs failed to establish a compensable loss. To the contrary, plaintiffs established that the loss of the Innovaid 600 as a marketing tool had substantial deleterious effects on their sales and profits. "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' (Rest.2d Torts, § 912, p. 478.) However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.'" (Rest.2d Torts, § 912, com. a, at p. 479.) [¶] If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof. [Citations.]" (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219.) Here, plaintiffs adequately proved damages arising from Swanson's tortious conduct. To the extent future damages were speculative, defendants were to blame and may not now rely on that circumstance to undermine the damages award. Testimony by plaintiffs coupled with Baggott's reasonable opinions, based upon his experience and research in the field, sufficiently established the detrimental impact of the loss of the Innovaid 600 as a marketing tool.

## VII. Incompetence of Counsel

Defendants acknowledge the general proposition that courts will not grant relief to a party in a civil action on the basis of counsel's incompetence. (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 155 [". . . the negligence of trial counsel is not a ground upon which a new trial may be granted."].) Nonetheless, in reliance upon *Russell v. Dopp* (1995) 36 Cal.App.4th 765, defendants contend their counsel's performance was so deficient as to justify reversal. That case is, however, clearly distinguishable. There, trial counsel was not licensed to practice law, having resigned from the bar over 20 years before the trial. Counsel impersonated his son, a licensed attorney. The appellate court reversed the judgment on the ground that a fraud had been perpetrated upon unknowing clients and the court. (*Id.* at pp. 777-778.) Here, Connick was a licensed attorney throughout his representation of defendants and until the jury rendered its special verdict.

## VIII. Award of Costs

Finally, defendants contend the court erred in denying their motion to tax the cost, requested by plaintiffs, of a transcript not ordered by the court. As part of their award of costs, plaintiffs received \$1,537.50 for the cost of the trial transcript. This transcript was apparently obtained by plaintiffs in preparation for defendants' motion for new trial. The parties agree that the transcript in question was not ordered by the court but by plaintiffs' counsel. Their dispute turns on the interpretation of Code of Civil Procedure section 1033.5, subdivisions (a)(9) and (b)(5), which respectively allow recovery by the prevailing party for the cost of "[t]ranscripts of court proceedings ordered by the court" and disallow recovery for the cost of "[t]ranscripts of court proceedings not ordered by the court." Plaintiffs contend that the phrase "ordered by the court" modifies the immediately preceding phrase, "of court proceedings." As a consequence, plaintiffs argue, the cost of the transcript here was recoverable even though the transcript was not ordered by the court because the proceeding itself (i.e., the trial) was ordered by the court. Defendants contend the phrase "ordered by the court" modifies the word "transcripts"

such that the cost of only those transcripts ordered by the court would be recoverable.

Defendants are correct.

Before its repeal in 1953 (Stats. 1953, ch. 206, § 7, p. 1342), Code of Civil Procedure former section 274 provided, in part: "In civil cases the fees for reporting and for all other *transcriptions ordered by the court* to be made must be paid by the parties in equal proportion, and either party may, at his option, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case. The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same." (See Stats. 1951, ch. 1653, § 2, p. 3746, italics added.) As the court in *Newberry v. Evans* (1927) 86 Cal.App. 106, 111, wrote: "Section 274 of the Code of Civil Procedure allows the prevailing party to charge as costs in the trial court the reporter's fees of making a transcript of the testimony *when the transcript is ordered by the trial court . . .*" (Italics added.)<sup>9</sup>

Code of Civil Procedure former section 274 was replaced by Government Code sections 69947 to 69953. (Stats. 1953, ch. 206, § 1, pp. 1265-1266; see also Historical Note, 13 West's Ann. Code Civ. Proc. (1982 ed.) § 274 p. 494.) Government Code section 69952 provides that the trial court may order the preparation of a transcript at court expense in certain proceedings, including criminal and juvenile matters. Government Code section 69953 provides in relevant part: "In any case where a verbatim record is not made at public expense pursuant to Section 69952 or other provisions of law, the cost of making any verbatim record shall be paid by the parties in equal proportion; and either party at his option may pay the whole. In either case, all amounts so paid by the party to whom costs are awarded shall be taxed as costs in the case. The fees for transcripts and copies ordered by the parties shall be paid by the party ordering them."

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<sup>9</sup> The court in *Newberry v. Evans*, *supra*, 86 Cal.App. at page 111 was interpreting an earlier, though essentially identical, version of Code of Civil Procedure former section 274.

Code of Civil Procedure section 1033.5 is merely a compendium of costs, allowed and disallowed. We interpret that statute's use of the phrase "[t]ranscripts of court proceedings ordered by the court" in concert with the long statutory history, set forth above, for awarding similar costs. That history demonstrates that the crucial determination is whether the *transcript* was ordered by the court, not whether the *proceeding* was ordered by the court.

By focusing on whether the transcribed proceeding was ordered by the court, plaintiffs seek to distinguish proceedings, such as *in limine* motions, that are noticed by the parties. However, they fail to adequately explain the significance of this distinction for purposes of assigning the cost of preparing a transcript. For instance, here, although the trial proceedings were presumably "ordered by the court," the transcript of the trial was requested by plaintiffs' counsel in order to prepare for a proceeding not ordered by the court, the motion for new trial. Plaintiffs suggest that defendants' reading of the statute renders the phrase "of court proceedings" superfluous. Not so. That phrase limits recompensable costs to the transcripts of court proceedings as opposed to transcripts of proceedings or events occurring outside of court.

Defendants point to the description of such costs found in *Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1200 ("transcripts ordered by the court") and *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 910 ("court-ordered transcripts"). Plaintiffs argue that these references are dicta. Presumably, neither appellate court was presented with plaintiffs' interpretation of the governing statute; to that extent, the descriptions are dicta. Nonetheless, the descriptions employed by the courts are indicative of the meaning apparent on the statute's face. Code of Civil Procedure section 1034 vests in the Judicial Council the authority to formulate procedures for requesting prejudgment costs, such as those at issue here. Plaintiffs utilized form MC-010, approved by the Judicial Council for that purpose. The preprinted portion of that form includes a provision for "Court-ordered

transcripts,” wherein plaintiffs wrote their request for \$1,537.50. While not controlling, the Judicial Council’s interpretation of the statute too is persuasive.

We conclude that Code of Civil Procedure section 1033.5, subdivision (a)(9) permits the prevailing party to recover the costs of transcripts of court proceedings when those transcripts were ordered by the court. Similarly, Code of Civil Procedure section 1033.5, subdivision (b)(5) prevents the prevailing party from recovering the costs of transcripts of court proceedings when those transcripts were not ordered by the court. The trial court improperly denied defendants’ motion to tax costs.

### **Disposition**

The judgment in plaintiffs’ favor is affirmed. Defendants shall bear the parties’ costs of their appeal from that judgment. The order after judgment denying defendants’ motion to tax costs is reversed. The parties shall bear their own costs of that appeal. The matter is remanded to the trial court for correction of the costs award and for determination of costs on appeal.

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Corrigan, PJ

We concur:

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Parrilli, J.

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Walker, J.

*Hackett v. Swanson*, A078559 & A078590

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

**AFFIDAVIT IN SUPPORT OF SEARCH WARRANT**

I, John Samuelson, Inspector II being sworn, says that on the basis of the information contained within this Affidavit and the attached and incorporated Statement of Probable Cause, he has probable and reasonable cause to believe, and does believe, that the property described below is lawfully sizable pursuant to Penal Code Section 1524, as indicated below by "X"(s) in that it:

☐ was stolen or embezzled

☐ was used as the means of committing a felony

☐ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have been delivered it for the purpose of concealing it or preventing its discovery

☒ tends to show that a felony has been committed or that a particular person has committed a felony

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the location(s) set forth below and thus requests the issuance of a warrant to search

**THE FOLLOWING LOCATIONS:**

1) Scott Swanson Enterprises dba Advanced Instruments and Innovative Hearing Corporation located at 370 East 14th. Street, San Leandro California, in the County of Alameda; further described as a one story house which has been converted into an office building at the corner of Sunnyside Dr., consisting of offices, computer systems and storage areas located within the offices and a garage/shed in back of the building within the fenced area of the property.

2) Innovative Hearing Corporation and the residence of Scott Swanson and Jennifer Lorenzo located at 111 Auburn St. San Rafael California; County of Marin; further described as a two story brown and white house near the corner of Woodland Av.

3) 94 Dodge Van white in color with California License 3KJG899

5) 95 Honda 4dr red in color with California License 3KHG888



- 6) 1100 Davis St. City of San Leandro, Lockaway Storage Locker # C116
- 7) Pacific Coast Laboratories 1031 San Leandro Blvd. City of San Leandro, California, County of Alameda; further described as a one story industrial building located near the corner of Davis St. for only the property described below under item 15.
- 8) Alameda Newspaper Group 116 West Winton Avenue, Hayward California, County of Alameda, for only the property described below under item 16.

FOR THE FOLLOWING PROPERTY, pertaining to or concerning Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo, by whatever means and on whatever media it may be stored including any such property, things and evidence being on, or stored on film, microfilm, other photographic media, videocassette, tape, loose magnetic and/or optical media or any other media which is capable of storing magnetic coding and/or by use of computer, including internal or external hard drive, optical disk, hard disk, floppy disk, backup tape, compact disk, data cartridge, removable storage media, electronic notebook, or printer buffer:

- 1) Business records, including books, ledgers, journals, summary ledgers and journals, memoranda, letters, written contracts, customer or patient records; invoices, daily sales records, contracts for sale and purchase, sales receipts, order books, employee records, payroll records, calendar notations; appointment books; cash receipts and disbursements, sales or promotional presentation video tapes, training or instructional video tapes, and advertising copy, records and correspondence relating to the solicitation and sale of hearing aid products, business opportunities, products or services;
- 2) Complaint letters, complaint forms, notations in other records and correspondence regarding customer or patient complaints about the fit, quality, price, advertising or characteristics of hearing aid products, business opportunities, products or services;
- 3) Records and lists, including but not limited to personnel records, payroll records, personnel files, commission checks, ledgers, debit/credit accounts, tax accounts, savings and checking accounts; memorandums, dayrunners and/or other types of scheduling/planning journals, records of payment and calculation of commissions, rewards, incentives and bonuses, of all employees, independent contractors and other persons, engaged in or responsible for the solicitation and sale of hearing aid products including Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo..
- 4) All material used for the purpose of advertising or attracting prospective customers and buyers of hearing aid products, including but not limited to flyers, newspaper advertisements, radio, television or video advertisements, telemarketing scripts, and copy or scripts for such advertisements, correspondence, and contracts for advertising;

5) Cancelled checks, copies of cashier's checks or money orders, cash and checks, account ledgers, credit card receipts or statements from credit card companies, bank statements and other financial records relating to the solicitation and sale of hearing aid products business opportunities, products or services;

6) Any written material, including audio or video tape, which constitutes evidence of a conspiracy to engage in the fraudulent solicitation and sale of hearing aid products, including but not limited to memoranda, contracts, correspondence, minutes of meetings, notes, fax messages, correspondence, notations in customer files, computer messages or electronic mail;

7) All information sheets, brochures and mailers, price lists; existing physically or in a computer memory, or in computer data storage devices, which describe or explain the products or services sold by or through Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo.

8) All lists, cards, account books, ledgers and receipts, existing physically or in a computer memory, or in computer data storage devices, which contain the names, addresses or phone numbers of persons who purchased hearing aid products or; responded to any advertisement;

9) All letters, memos, and other correspondence, existing physically or in a computer memory, or in computer data storage devices, between offices or computer memory, or computer data storage devices, or between employers or employees of Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo relating to the sale of hearing aid products, business opportunities, products or services;

10) All contracts, written agreements, letters, and memos, existing physically or in a computer memory, or computer data storage devices, which set forth, describe or explain the business relationship between, or the terms or conditions of the business transactions between and among Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo.

11) All letters, memos, reports, bills, receipts, account books, bank statements, and ledgers, existing physically or in a computer memory, or computer storage services, showing income or expenses made or incurred by Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo.

12) All letters, memos and other correspondence, existing physically or in a computer memory, or computer data storage devices, which set forth, explain or describe a complaint or dissatisfaction by a purchaser of products or services from Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo.

13) All lists, cards, payroll books, ledgers, sales reports, payroll checks or copies thereof, address books and telephone number books and lists, existing physically or in a computer memory, or in computer data storage devices, which lists or describe the names, addresses, or telephone number of present or past employees of Scott Swanson Enterprises dba Advanced Instruments, San Leandro; Innovative Hearing Corporation; Scott Swanson; Jennifer Lorenzo.

14) Indicia of ownership and/or possession and/or control of said property and/or said businesses, including but not limited to federal, state, county and city business licenses, utility receipts, rental or lease contracts, rental or mortgage payment receipts, addressed envelopes; correspondence, photographs, partnership agreements, articles of incorporation, minutes of corporate meetings, company letterheads, and sales presentation documents, in writing, on computer media, or on audio or videotape;

15) **PACIFIC COAST LABORATORIES ONLY:** Business records, including books, ledgers, journals, summary ledgers and journals, memoranda, letters, correspondence, written contracts, invoices, sales records, contracts for sale and purchase, sales receipts, order books, or other documents showing the purchase and sale of Innovaid 600 hearing aids and other hearing aid products from Pacific Coast Laboratories to Scott Swanson, Jennifer Lorenzo; Scott Swanson dba Advanced Instruments San Leandro or Innovative Hearing Corporation, or any employee or designee of any such persons or organizations.

16) **ALAMEDA NEWSPAPER GROUP ONLY:** Business records, including books, ledgers, journals, summary ledgers, memoranda, letters, correspondence, written contracts, invoices, sales records, sales receipts, billing and payment records, order books, advertising copy; diagrams, pictures, drawings or other documents showing the pricing, ordering, content, design or placement of any advertising of any type by Scott Swanson, Jennifer Lorenzo; Scott Swanson dba Advanced Instruments San Leandro or Innovative Hearing Corporation, or any employee or designee of any such persons or organizations, and copies of any advertisements placed in any publication of the Alameda Newspaper Group.

#### **STATEMENT OF PROBABLE CAUSE**

YOUR AFFIANT, John Samuelson, is an inspector with the Alameda County District Attorney's Office, Oakland, California, and has been so employed for six years.

During this period your affiant has investigated crimes being sent to trial in the Superior Court of the State Of California. These crimes include homicide, sex offenses, grand thefts, burglaries, robberies and drug violations.

Your affiant has been a Peace Officer in the State of California for over 27 years having served 21 years with the Oakland Police Department. During the 21 years of service with the Oakland Police

Department he was assigned to investigate all types of crimes which occurred in the City Of Oakland. He was assigned as an Crime Scene Investigator for 14 years where he was responsible for identifying, collecting, and preserving evidence. He was also assigned as a background investigator and worked as a crime analysis.

Your affiant attended a three week school in Long Beach California on the collection and preservation of physical evidence. A two week school at the F.B.I Academy on crime scene photography, and a two week school on fingerprinting and collection of trace evidences also at the F.B.I Academy.

Affiant also attended a one week school in bomb scene investigation put on by the F.B.I in Gilroy California.

Since 1994 your affiant has been assigned to the Consumer and Environmental Protection unit of the Alameda County District Attorney's Office. In that capacity, he is responsible for the investigation of criminal and civil violations of the California Penal Code, Business and Professions Code, Consumer and Environmental Protection statutes, and other violations of any State or Federal Law.

In the last three years your Affiant has investigated a variety of civil and criminal frauds committed in the context of real estate, securities and other investment schemes, ponzi and pyramid schemes, contractor fraud, false and deceptive advertising along with other consumer complaints.

Your affiant has attended the following training programs since his assignment to Consumer and Environmental Protection Unit.

Insurance Fraud Seminar-24 hours course sponsored by The California District Attorney's Association.

Hazardous Materials Training-40 hour course sponsored by The Alameda County Health Department.

Basic Criminal Environmental Investigations- 24 hour Western States project / EPA

Advanced Environmental Crimes Training - 80 hours course by the United States Environmental Protection Agency in Glyno, Ga.

#### Summary

Suspects Scott Swanson and his girlfriend/housemate Jennifer Lorenzo are defrauding elderly hearing aid customers out of thousands of dollars and engaging in the unlicensed fitting and selling of hearing aids. Swanson and Lorenzo are using their business to accomplish this purpose. They

jointly operate a hearing aid store known as Advanced Instruments located at 370 East 14th. Street, San Leandro. The formal name for this business is Scott Swanson Enterprises dba Advanced Instruments. Until approximately October 1996 it was owned by Scott Swanson. On October 10, 1996, Scott Swanson lost his hearing aid dispenser's license after an evidentiary hearing which took several days. Because Swanson was thereafter legally prohibited from owning or managing a hearing aid dispensing business, he and Lorenzo began telling people that the ownership of the business has been turned over to Jennifer Lorenzo. Swanson still runs the business jointly with Lorenzo and is still listed as the Chief Executive Office and Chief Financial Officer of the corporation with the California Secretary of State. Lorenzo is not listed as either an officer or as a director of Scott Swanson Enterprises. The other business involved in the fraudulent sales practices is Innovative Hearing Corporation, which is wholly owned by Swanson. It owns the patent to one product, the Innovaid 600, which is a hearing device similar in function to an old fashioned ear horn. It contains no electronic parts and is for the most modest of hearing loss in a particularly small range. Lorenzo and Swanson mainly use the innovaid 600 as a misleading advertising device.

Lorenzo and Swanson draw customers into their San Leandro hearing aid store with newspaper advertisements which make untrue or misleading statements as to characteristics of the hearing aids described or depicted in the advertisements and as to the pricing of their hearing aids. The customers, who are predominantly elderly persons, are not offered the inexpensive hearing aid described in the advertisement. Instead, they are sold hearing aids costing thousands of dollars through sales pitches consisting of misrepresentations as to the characteristics and quality of their products. The appointments with customers are scheduled so closely together that a proper evaluation is not possible. Misleading hearing tests are administered and fraudulent sales pitches are delivered in a "hard sell" fashion by Scott Swanson. Once the customers realized that the products which they have purchased are not as represented to them, Scott Swanson uses a variety of means to intimidate the customer from seeking outside help or legal relief. In addition to not being allowed to own a hearing aid store, by virtue of his license revocation, Swanson is prohibited by criminal statute from fitting, selling, selecting, adapting, testing or offering post fitting counseling for hearing aids. Jennifer Lorenzo has never been licensed to fit or sell hearing aids. Lorenzo and Swanson have employed an ever changing series of licensed dispensers who eventually leave when they discover that their own license may be at risk due to their association with the fraudulent practices of Swanson and Lorenzo. The loss to the persons described in this affidavit exceeds \$50,000.00. The possible felony offenses committed include Grand Theft by false pretenses; conspiracy to commit grand theft; the unauthorized use of a credit card, conspiracy to conduct the unlicensed fitting and selling of hearing aids; Business and Professions Code unlicensed to fit / sale (Business and Professions code 3427, 3306, and 3308), and conspiracy to sell goods or services through false or misleading advertising (Business and Professions code 17500).

#### Misleading Advertisements:

The misleading advertisements have appeared at regular intervals for at least the previous three years in the Alameda Newspaper Group of Newspapers which include, the San Mateo Daily Review, The Oakland Tribune, The Argus, The Alameda Times-Star and the Tri Valley Herald. The most recent advertisements appeared the week of July 21, 1997. The layout of the advertisements have changed

over time as can be seen by the examples attached as exhibits and incorporated by reference into this affidavit. Most of the written claims made about the products, the prices advertised and the illustrative diagram used have remained the same in most of the advertisements. The Hearing Aid Dispensers Committee sent me numerous complaints they had received from consumers and competing hearing aid dispensers about the practices and misleading newspaper advertisements of Advanced Instruments, San Leandro. I reviewed the advertisements with two audiologists: Jane Baxter, Atherton and Ken Billheimer, Pleasanton and one hearing aid dispenser: John Diles, San Leandro. Audiologists have advanced training in all aspects of hearing problems and they have additional licensing requirements. Billheimer had previously complained to the Hearing Aid Dispensers Examining Committee about the advertisements of Scott Swanson in 1995. Diles complained to San Leandro Police Department in 1997 in connection with the case of a customer who came into his store. The details of that incident are set forth below. Baxter had never heard of Scott Swanson. Among the numerous problems with the advertisement according to all three hearing aid professionals, are the following:

1. The advertisements depict a tiny and relatively expensive hearing aid of a type which fits entirely into the ear canal. This is known as a "CIC" or "completely in the canal" hearing aid. The problem noted by all three is that the drawing is not to scale in that the device is not as small or invisible as depicted.
2. All three thought that the claim in the advertisement that there is "NO ANNOYING WHISTLING" is false in that every hearing aid has some "whistling" which is nothing more than feedback between the microphone on one end of the hearing aid and speaker on the other end.
3. The advertisement also claims that there are "FEWER WAX PROBLEMS." Mr. Diles and Mr. Billheimer both thought this claim was untrue in that hearing aids which fit completely in the canal are known to create more wax problems than other types of hearing aids as they slide in and out of the ear canal.
4. The advertisement also states "USE DURING SLEEP." All three thought that this claim was misleading. It is generally recommended that hearing aids should be removed during sleep. At some point air needs to circulate into the ear canal to prevent the build up of bacteria.
5. The claim "DOES NOT SHOW" is not true. There is no hearing aid which is completely invisible.
6. The advertisement also claims "WON'T FALL OUT." This is false because whether or not a hearing aid falls out depends on the custom fit achieved and the individual curvatures of the ear canal its self. A hearing aid is more likely to fall out of the ear of a person whose canal is relatively straight.
7. The advertisement also states "NO VOLUME WHEEL." On completely in the canal hearing

aids, although there is no volume adjustment accessible to the patient on the outside of the hearing aid, there is a volume adjustment control accessible to the dispenser within the aid. The absence of a volume control suggests automatic electronic control which is a feature available on many expensive hearing aids costing as much as \$4,000.

8. The price of \$239 is the only price listed in the advertisement. There is also a \$100 off coupon. It is unclear what type of hearing aid may be purchased for \$239 because the one pictured is a CIC hearing aid (completely in the canal) and costs upwards of about \$1,200.
9. The extremely limited usefulness of the Innovaid 600 is concealed from the consumer. According to the three hearing aid professionals with whom we consulted, Diles, Billheimer and Baxter, the Innovaid 600 instrument which is part of every one of Swanson's advertisements is a very inexpensive experimental empty plastic shell device which, when placed in the ear, simulates the effect of a hand cupped behind the ear. It does not produce much amplification because it has no electronic parts. It simply shifts the frequency of the sounds entering the ear and slightly improves hearing in those frequencies. In the hearing industry according to the three persons with whom I consulted, this device is generically called an acoustical device as opposed to a traditional hearing aid which is referred to as an electronic device. There is only a very small percentage of persons with "mild" hearing loss who are appropriate for these acoustical hearing device. In an article written by the inventor of the Innovaid 600 acoustical device, Dr. Richard Goode, the recommended use of the device includes cupping your hand behind your ear to further amplify the sounds when in a "difficult hearing situation." This article was faxed to me by Ken Billheimer, the Pleasanton audiologist with whom I consulted. (Article published in volume 94, number 3, March 1986 Otolaryngology - Head and Neck Journal) According to Scott Swanson's testimony at his licensing hearing on July 23, 1996, the \$239 price relates to the device called the Innovaid 600. Scott Swanson referred to this device as "... very much an experimental, one-of-a-kind instrument." (vol II, pg. 125, lines 3-4) By Scott Swanson's own testimony he has recommended it to only 2% of the patients he has ever seen. He estimates that he has "recommended" the Innovaid 600 in "around 40" cases which he characterizes as "a pretty small percentage." (111, 12 - 19) He estimates that he has personally fit "something like 2,000 people with hearing aids." (vol II, pg. 90, lines 9 - 11)
10. Nearer to the drawing at the top of the advertisement the advertisement states: "FOR MODERATE TO SEVER HEARING LOSS." Near the price of \$239 the following statement is made in smaller print: "The Innovaid 600 non-electronic acoustic hearing aid designed for mild hearing loss by Stanford University Professor Dr. Richard Goode Inventor" Because the word Innovaid appears at both the top and the bottom of the advertisement and because most consumers do not know whether their hearing loss is mild or severe, the elderly citizens who have seen the advertisement have been confused about what they can purchase for the advertised price of \$239. The licensed dispenser who worked for Advanced Instruments in San Leandro, David Parks, told me on July 23, 1997 that he spends a great deal of time explaining to customers who have seen the ad that it is

advertising two different instruments. He says almost all of the customers are confused about what they can get and for what price. Mr. Parks left Advanced Instruments on August 4, 1997.

According to all of the audiologists, consumers are often in denial about their hearing loss and are sometimes not good subjective judges of the severity of their own hearing loss. The audiologists are also of the opinion that by the time most people seek treatment for a hearing loss problem, their hearing loss is more severe than the recommended fitting parameters for the Innovaaid 600. Each of the audiologists were aware of the Innovaaid 600 and its predecessor devices. Each had fit at least a few patients with the device many years ago. All three were of the opinion that the device had not helped these patients and that most if not all of these patients had to be refit with a traditional device which provided greater amplification.

The files of the Hearing Aid Dispensers Examining Committee contained additional complaints about Scott Swanson's advertisements from other hearing aid dispensers who work in the Bay Area. These include: two complaints from : Advanced Instruments Fremont, and one complaint from each of the following: Advanced Instruments San Mateo, Advanced Instruments Concord, Advanced Instruments El Cerrito. There are about a dozen Advanced Instruments stores which are all independently owned and operated. Norm Schlaegel, the owner of Pacific Coast Laboratory has a contractual agreement with Scott Swanson and Innovaaid Corporation to manufacture the Innovaaid 600. He said that he has made only 10 Innovaaid 600s since last June. He was the former owner of the Innovaaid Corporation. He sold the company about three years ago to Scott Swanson. He was no longer interested in owning the company because he was worried about "bait and switch" advertising by hearing aid dispensers.

Example of the advertisements run in the newspapers of the Alameda Newspaper group newspapers during 1995, 1996 and 1997 are attached as exhibit [A] and are incorporated by reference. These were sent in to the District Attorney's office and to the HADEC over the years with customer complaints and were copied from recent newspapers by the staff of the District Attorney's Office.

Scott Swanson's advertisement was also found to be misleading and deceptive in 1996 by the Honorable Cheryl Tompkin, Administrative Law Judge in the case Hearing Aid Dispensing and Examining Committee v. Scott Swanson. As part of the determinations and findings which were the basis of the revocation of Swanson's dispenser's license she states:

Respondent contends his advertisement for a \$239 hearing aid is not false or misleading because the Innovaaid 600 does cost less than other FDA approved hearing aids and because the description of the Innovaaid Innplant is based on verifiable data. Assuming, without deciding, that the Innovaaid 600 costs less than some hearing aids and that the description of the Innplant is based on verifiable data, it is nevertheless determined that the overall effect of the advertisement



is misleading. The advertisement fails to disclose material facts (such as the regular price of the Innovaid 600 or the price of the Innovaid Innplant) and does not clearly indicate the \$239 "sale" price does not apply to the Innplant hearing aid shown and described at the top of the advertisement. This could cause an ordinarily prudent person to misunderstand or be deceived by the advertisement.

Moreover, it appears the advertisement was specifically designed to achieve that result. Respondent provided specific instruction to his employee Phillip Beeber on how to sidestep question relating to the price of the advertised hearing aids. Beeber's primary job was to convince as many people as possible to come into the office so that respondent could sell them much more expensive hearing aids. (Finding 6.) Thus, the misleading advertisement was used to induce consumers to call or make appointments for professional services with respondent. The advertisement also failed to contain specific price information. (Finding 4.) For the foregoing reasons it is found that respondent's advertisement was misleading and deceptive.

A copy of the newspaper advertisement which the administrative judge found misleading is attached as Exhibit B to this affidavit and is incorporated by reference. Deputy Attorney General Dave Carr who prosecuted the case HADEC V. SWANSON sent this exhibit which was admitted into evidence at the administrative hearing.

Intertwined Relationships of the Parties and Business Entities:

On July 23, 1996 Scott Swanson testified in the case Hearing Aid Dispensers Examining Committee, Department of Consumer Affairs vs. Scott Swanson,<sup>1</sup> case no. N9509005. He testified that he was first licensed to dispense hearing aids in 1989. (vol II:69:12-13). He purchased the "small house office building" at 370 East 14th. Street in January 1994 from which he ran his hearing aid business. (vol. II,pg.72, lines 6 - 11) On June 13, 1997, in a debtor's examination of Scott Swanson in connection with Gregg Hackett, et. al. v. Scott Swanson et. al.,<sup>2</sup> Alameda County Superior Court Docket No. 728196-7, Swanson testified that Lorenzo purchased Scott Swanson Enterprises Inc. in October 1996. Swanson said that the purchase price was \$80,000 payable at \$1000 per month for 80 months. (June 13, 1997 RT 12 -14) On October 18, 1996, Jennifer Lorenzo sent a letter by fax to the Hearing Aid Dispensers Examining Committee informing them that she had "bought the corporation that owned Advanced Instruments in San Leandro" and that "Innovative Hearing Corp.

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<sup>1</sup> Hereinafter referred to as HADEC v. Swanson.

<sup>2</sup> Hereinafter referred to as Hackett v. Swanson.

is providing marketing support." Lorenzo did not inform the Hearing Aid Dispensers Examining Committee that Innovative Hearing Corp. was owned by Scott Swanson. Innovative Hearing Corporation, until recently, held the patent and rights to the Innovaid 600 empty plastic shell device described above. Other hearing aids with electronic amplification, such as the "Innplant", the "FCC" and the "FMC," are manufactured by other companies such as FineTone and Lori Labs, but are sold as Innovaid hearing aids. ( Hackett v. Swanson RT- Volume II: pg. 456 - Sept. 12, 1995 , and Exhibit 18) Swanson tried to market the use of the Innovaid name, product line and advertising materials to other hearing aid distributors. (Hackett v. Swanson RT 516- 517, Exhibit 18 and Exhibit J) Swanson testified that he now performs the work for Innovative Corporation at his home. Hackett v. Swanson Order of Examination June 13, 1997 pg. 42.

On June 13, 1997, Swanson further testified in Hackett v. Swanson that instead of payments under the purchase agreement with Lorenzo, Advanced Instruments gives him credit of \$1000 per month against a debt he owes to Advanced Instruments. Swanson testified that these payments are reflected in the accounting records for Advanced Instruments but the debt is not memorialized in any written note. (RT 26 - 27) Swanson does not have a copy of the agreement entered between himself and Lorenzo to transfer the business. (June 13, 1997 RT 35) Swanson testified that no appraisal of the value of the business was done at the time of the purchase by Lorenzo. (June 13, 1997 RT 67) On July 23, 1997, Jennifer Lorenzo came to the District Attorney's office for an interview at my request.

She said that Swanson had told her that he had an appraisal of the business done and that the business was worth \$150,000. She told me that she did not ask him a lot of questions about the financial condition of the business before she entered the agreement to purchase the business. She did not know if any judgments were owed, if the business had been sued or how much the income and the expenses were. She had not reviewed the any business tax returns for the business before purchasing it. According to Scott Swanson's tax returns for the years 1991, 1992 and 1993 which were trial exhibit number 37 in Hackett v. Swanson, the yearly gross income from the Advanced Instruments business was \$563,928 in 1991, \$398,839 in 1992 and \$425,774 in 1993. In a series of documents prepared during the pendency of Hackett v. Swanson, also part of trial exhibit number 37, Swanson's stated income from Advanced Instruments combined with his gross income from Innovative Hearing Corporation between May 1993 and May 1995 was \$592,895.72.

Swanson testified that he still works with Lorenzo as a "consultant." Swanson testified that in February 1997, he received a \$7,000 payment from Jennifer Lorenzo for about 90 hours of work performed at an "open house" which she held. (Hackett v. Swanson RT 36 - 38) He described that an open house is a big promotional event where a number of "consultants" are brought in. Swanson testified that the specific work he did at the open house was consulting with new and previous patients about which products would be appropriate for them. (June 13, 1997 Hackett v. Swanson RT 37)

Swanson also testified that he still consults with Lorenzo about five times per week about problems she has running the business such as questions about vendors and problems with patients. (June 13, 1997 Hackett v. Swanson RT 39) He says that he is not compensated for this consultation and spends less time consulting Lorenzo now than he did when he first turned over the business to her. (June

13, 1997 Hackett v. Swanson RT 40-41) California Department of Motor Vehicle records show Scott Swanson's residence address listed as 111 Auburn Street San Rafael 94901. In the order of examination of Scott Swanson conducted on Friday June 13, 1997 in the case Hackett v. Swanson vol II, pg.6, Swanson testified that his "present address" is "111 Auburn Street San Rafael 94901." Swanson testified that Jennifer Lorenzo moved into his home in March 1996 and that he has a "steady dating relationship" with Lorenzo. (June 13, 1997 Hackett v. Swanson RT 12 - 44)

On June 13, 1997, Lorenzo was the subject of an undercover surveillance conducted by the District Attorney's Office. She explained to the undercover investigator that Scott Swanson works for Advanced Instruments as "a consultant" and helps her run the business which includes answering questions for the clients that she cannot answer. Also, as part of the consultation, he administers some word tests. Lorenzo admitted that these word tests were the same tests he had administered to Rosalee Jackson, a patient who was being discussed by the Investigator and Lorenzo. According to three hearing professionals, Jane Baxter, John Diles and Ken Billheimer, the tests conducted on Rosalee Jackson were not standardized tests and would not provide useful diagnostic information. The test performed by Swanson were deceptive versions of standard tests which would only be useful as selling tools because they would inaccurately cause the patient to believe that their own hearing loss was severe and that Swanson's hearing aid would cure their problem. These tests are described in more detail below. (See complaints by Rosalee Jackson, Mr. Ronald Seigel and former employee X.)

On October 22, 1996, the Hearing Aid Dispensers Examining Committee sent Lorenzo a copy of their publication: Laws and Regulations Relating to the Practice of Hearing Aid Dispensing, after Jennifer Lorenzo informed them that she was the owner of Advanced Instruments. Lorenzo was specifically informed that a person whose license has been revoked may not be the proprietor of a business engaged in the fitting or selling of hearing aids. In a fax from Jennifer Lorenzo also dated October 22, 1997 she assures the HADEC in the language of the statute that "Scott Swanson is no longer a proprietor, partner, shareholder, fiduciary in this corporation." In the last of a series of letters between Lorenzo and the HADEC dated February 27, 1997, Peggy Richardson at HADEC again informed Lorenzo that because Swanson's license was revoked, he could not participate in the ownership or operation of a hearing aid dispensing business. Richardson also specifically informed Lorenzo that manufacturer's consultants must be licensed if they engage in any acts of fitting or selling hearing aids. The Committee again requested proof that Lorenzo has taken over ownership of the Advanced Instruments business, which Lorenzo has repeatedly failed to provide. This series of letters, which HADEC forwarded to me, put Lorenzo on notice that she could not have Scott Swanson perform acts of fitting or selling hearing aids even if he held himself out as a manufacturer's consultant by virtue of his ownership of Innovative hearing Corporation. In Hackett v. Swanson, Scott Swanson testified that his "closing rate" is "very high." He bragged that "The clients that come into my office usually buy from me. They very seldom walk out. I'm very good at my sales job." (RT 452) Lorenzo's position that Swanson was no longer involved in her business shows that she understood what was required to conduct her business lawfully but chose to secretly employ Swanson to continue to close the deal with patients in her office.

In February or March 1997, according to Scott Swanson's testimony in Hackett v. Swanson, Innovative Hearing Corporation (solely owned by Scott Swanson) sold the trade name and patents for the Innovaid 600 to Jennifer Lorenzo as the new owner of Scott Swanson Enterprises dba Advanced Instruments, San Leandro for a \$10,000 down payment, \$10,000 in five years and \$250 per month interest until the note is paid in full. (June 13, 1997 RT 50 - 52) Swanson testified that he, as Innovative Hearing Corp., sold the trade names and patents to Jennifer Lorenzo as the owner of Scott Swanson Enterprises dba Advanced Instruments because "It wasn't doing me any good. It wasn't making me any money." (June 13, 1997 RT 56) He testified that Scott Swanson Enterprises (Lorenzo) bought the trade name and patents because "They were using the products in advertising and trade names." (June 13, 1997 RT 56 - 57) According to Swanson, the payments owed under this agreement are the same as the payment arrangement for the purchase by Lorenzo of Advanced Instruments. The payments come from Advanced Instruments and go back to Advanced Instruments as payments on Swanson's debt to Advanced Instruments for which there is no written record. (June 13, 1997 RT 57 -58 and 26 - 27) Swanson says that the records of these payments are kept at Advanced Instruments. (June 13, 1997 RT 58) On July 23, 1997, Jennifer Lorenzo came to the District Attorney's office for an interview at my request. She told me that she did not know how much she paid for the patents and that she has not actually started paying for them because she and Swanson still need to work out the details of the purchase. She said that she did not know why she had purchased the patents. She said that she is now the person who places the advertising in the papers of the Alameda Newspaper Group. She said that the advertisements were designed by Scott Swanson.

Innovative Hearing Corporation is registered as a corporation with the secretary of state and Scott Swanson is listed as holding all of the Directors and Officers positions. The place of business for Innovative Hearing Corporation is listed with the Secretary of State as 370 East 14th. St., San Leandro, CA. This is the same business address for Scott Swanson Enterprises dba Advanced Instruments, San Leandro. According to the Alameda County Tax Assessor's records, Scott Swanson is the registered owner of the building located at 370 East 14th. Street, San Leandro from which the business of Advanced Instruments, San Leandro is conducted. Scott Swanson Enterprises dba Advanced Instruments is also a registered corporation with the California Secretary of State. The business address is also listed as 370 East 14th. Street. Scott Swanson is listed as holding the positions of Chief Executive Officer and Chief Financial Officer. Jennifer Lorenzo is not listed anywhere on the secretary of state filing. The businesses, Scott Swanson Enterprises dba Advanced Instruments and Innovative Hearing Corporation and the parties Jennifer Lorenzo and Scott Swanson are inseparably intertwined. The unusual business transactions between the parties and the efforts to conceal Swanson's involvement show that Swanson and Lorenzo have gone to great lengths to put together a single enterprise to continue business as usual which is to generate income by the fraudulent means set forth below.

#### Former and Current Employees

On July 23, 1997 David Parks came in to the District Attorney's Office for an interview at my

request. David Parks has been employed at Advanced Instruments since May 1997. He was interviewed for his dispenser's job by both Jennifer Lorenzo and Scott Swanson. Parks admitted that he told Rosalee Jackson that her hearing aid was self adjusting when he knew it was not. He said it is a common practice among hearing aid dispensers to make such misrepresentations. He said it is also Scott Swanson's practice to use that particular misrepresentation. He said that usually the customer is happy with the hearing aid so the questions of self adjusting vs. fixed volume control never comes up. Parks said that since he has been at Advanced Instruments Jennifer has held two open houses and Scott Swanson has sold hearing aids and written up contracts on both occasions. He says that even before he was contacted by me, he had serious reservations about continuing to work for Advanced Instruments and wanted to work until at least Friday July 25, 1997 to collect his paycheck. (On Monday August 4, 1997 I was informed by Dianne Tincher of HADEC that she had received a letter from Mr. Parks dated 2 August 97 that he had resigned from his job at Advanced Instruments). Mr. Parks also felt that the advertisement is misleading and many customers who come in to the store are confused about what claims and prices apply to which type of hearing aid. He said many customers who have seen the advertisement do not realize that two different instruments are being advertised with very different prices and characteristics. He said he spends a good deal of time on the phone and in person explaining the meaning of the advertisement to customers and potential customers. Since May he is aware of the sale of three Innovaaid 600 hearing devices which were ordered through Pacific Coast Labs. He says that customer and account information is kept in both file folders and in computer records in the 370 East 14th. St. San Leandro office. He was hired to work for a salary of \$52,000 per year which is very high for a dispenser. Lorenzo kept promising him a written employment contract but never delivered one to him. His previous salary was nearer to \$30,000 per year. Within the past few days Jennifer Lorenzo informed Parks that she was switching him over to strictly commission of 25%. Parks feels that this will result in a significant decrease in his income because he is also aware that Lorenzo plans another open house event in August which means that she will bring in a group of dispensers who will be competing with Parks for the commissions generated by the store. Parks says that he has observed Lorenzo talking on the telephone almost daily to consult with Swanson on business decisions.

Scott Swanson employed Philip Avrom Beeber as a dispenser between October 17, 1994 to July 4, 1995. (HADEC v. Scott Swanson July 22, 1996 RT vol. I, 134: 2- 3) Beeber saw about 12 clients each day. (RT138) Although hearing aid dispensers are supposed to refer clients to a physician if they had too much wax in their ears to conduct a proper examination, Beeber was told by Scott Swanson "never to tell people they had too much wax in their ears." (RT 140:14 - 24) After conducting such an examination, Beeber escorted the client to Scott Swanson who took their ear impression and wrote up the contract for the sale of a hearing aid. (RT 141 and 154). In his opinion, it was not possible to get an accurate ear mold impression from such a person. (RT 155) [This opinion was shared by Audiologist Jane Baxter when she was interviewed.] During the period of Beeber's employment he was not aware on any of the hearing aids advertised for \$239 being sold to a client. (RT 142) During that time period he remembers that the \$239 Innovaaid 600 advertisement "ran in some newspaper the full time that I was employed by Scott." (RT 135) Beeber testified that "most" of the customers he saw at Advanced Instruments asked him about the \$239

hearing aid they had seen advertised. (RT 142) In Beeber's opinion the advertisement was "vague." Beeber thought that the \$239 price could be confused by a reader as pertaining to the "tiny hearing aid on top." (RT 154) Beeber eventually quit his job at Advanced Instruments because he felt that through "guilt by association," his professional status and licensure might be endangered if he continued to work for Scott Swanson. (RT 146)

Suzanne Unger worked for Swanson October 1996 to March 1997. She stated that Swanson did continue to sell hearing aids to customers during 1997 after he lost his license. He sold Innovaid Products which she knew to be his own brand and a brand called Aura Care. She left Advanced Instruments because she was afraid of losing her dispenser's license. She had received a letter from the Hearing Aid Dispenser's Committee which caused her concern about her license. She observed that Scott Swanson and Jennifer Lorenzo would refuse to give refunds even in situations where she thought that a refund might be required under the law. Jennifer consulted Scott about every refund request. She was of the opinion that the advertisements which Advanced Instruments ran for the Innovaid were deceptive and she told Jennifer Lorenzo that she held this opinion. During her employment, she does not remember that any Innovaid 600's were ever sold to a customer. She said that Scott Swanson kept a few on hand to show customers. Scott Swanson tried to get around the 30 day refund law by writing up his own contract which she felt misinformed the consumers about the law.

Another employee, X, who worked for Scott Swanson within the past three years but does not want his/her name used because he/she is afraid of Scott Swanson. X states that Swanson "scares me to death." X has personally witnessed Scott Swanson violently hit another employee. X states that when Swanson lost his license, he turned the business over to Jennifer Lorenzo in name only. Swanson still ran the business from what X observed. X thought that Swanson used high pressure tactics and deceptive practices to sell hearing aids. Swanson would falsely tell customers that there was a "factory sale" which required the customer to make their purchase immediately. Swanson sold unnecessary additional insurance to customers which was the same as the warranty coverage given through the manufacturer. Swanson threatened to sue customers in small claims and Superior court if they asked him for a refund to which they were entitled under the law. Swanson told the customers that his law suit would cause them to have to spend money on attorney's fees. Swanson would also incorrectly date a sales contract in an attempt to get around the legally required time limit for refunds. Swanson would also refuse to answer the telephone or return telephone calls if he knew that a customer was attempting to return a hearing aid in an attempt to get passed the refund time period. Swanson would sell a "terrible" hearing aids made by a company called FineTone under the name Innovaid. Swanson also gave the "word discrimination test" in a deceptive manner. Swanson would use words which could be easily confused and would stand across a room and vary his voice so that the customer would miss 10 out of 10 words. X also stated that X thought that Swanson gave "good service" but would fight any refund. X also did not think that the advertisements were deceptive.

Ms. Cheryl Goddard worked for Swanson and Jennifer Lorenzo at Advanced Instruments from June

through December 1996. She still works occasionally for Jennifer Lorenzo and has worked as recently as the week of July 21 - July 25, 1997. She says that Scott worked at Advanced Instruments as recently as two weeks ago. He was at the business selling hearing aids. She says that Swanson was not fitting hearing aids. She says that Scott Swanson runs the business and that Jennifer does not make any decisions without first calling Swanson. She says that 95 - 100% of the customers come in to the store because of the hearing aid advertisement. Once the customers are in the store, Swanson attempts to sell them CIC (completely in the canal) hearing aids. Based on conversations with the hearing aid dispensers and audiologists set out at the beginning of this affidavit, CIC type hearing aids are the most expensive but not the best sounding aids because of their small size. During the time that Ms. Goddard was present at Advanced Instruments she only remembers one sale of an Innovaaid 600 hearing device. She witnessed many angry telephone calls from customers. Swanson would not return telephone calls to people who wanted their money back. She experienced Swanson using high pressure sales tactics.

With one elderly female customer, she remembers that Swanson kept attempting to put charges on the customer's credit card after the customer cancelled her order because she did not have enough money to pay for the hearing aids Swanson had sold her. At first, the charges were refused by the card company because the customer did not have sufficient available credit. Later, Swanson was able to place his charges on her credit card. Swanson called the customer and threatened that if she tried to stop payment on the charges, he would charge her three times the contract price. Ms. Goddard said that she wrote notes about this transaction on the office computer, in the customer record, noting the dates that the order was cancelled and the dates that Swanson finally charged the customer's card. When Ms. Goddard went to work at Advanced Instruments last week (week of July 21, 1997) these notations had been deleted from the customer's records. She stated that the days Swanson is in the office are written on a calendar.

### Customer Complaints

The HADEC and the Alameda County District Attorney's Office Consumer Fraud Division received numerous complaints involving persons who went to Advanced instruments based on the false and misleading statements made in Advanced Instruments newspaper advertisements, purchased hearing aids costing thousands of dollars based on the false or misleading representations of Scott Swanson and were threatened and refused a refund when they discovered that the hearing aids were not as represented. These HADEC complaints were forwarded to the District Attorneys Office and I have personally reviewed them. According to Diane Tincher who is the Enforcement Coordinator at HADEC, over the past three years that she had held her present assignment, HADEC has received 32 complaints against Scott Swanson. She says that this is far more than HADEC has received against any other dispenser in the last three years. One other person against whom action has been taken by HADEC received 17 complaints. Tincher says that of the 1600 dispensers licensed in California, most dispensers have no complaints in their files. Some have one or two. In her opinion, the number of complaints against Swanson is greater than can be explained away as simply disgruntled customers.

1997:

1. Rosalee Jackson 67 years old [January 1997]

During the months of January and February 1997 Rosalee Jackson saw the Advanced Instruments advertisement for a \$239 hearing aid in the TV Book of the San Mateo Times newspaper. On Jan. 28, 1997 Ms. Jackson arrived for her scheduled appointment and checked in with Jennifer. Suzanne Unger, the licensed dispenser working there at the time, administered the hearing tests. After the tests, she was then shown to another room to speak to the "consultant." The consultant was Scott Swanson. He looked at her chart and commented "I don't know how you've gotten along without a hearing aid." Ms. Jackson believed herself to have a mild hearing loss because she had gone without wearing hearing aids since 1995 when her previous aid broke. Swanson conducted a hearing test where he sat across the room from Jackson and had her repeat a series of about 10 words. Swanson told her that she did not get any of the words correct. He then told her about a "state of the art" hearing aid for \$4,000. When she told him that she could not afford to spend that much money. He next suggested a hearing aid that cost \$2,190. He told her that the volume was self adjusting. She told him that she did not have that much and started to gather up her things to leave. Swanson asked her how much she thought hearing aids cost. She told him that she had seen his advertisement for \$239 hearing aids. Swanson told her that the hearing aids in the advertisement were for people with "minor" hearing loss and that she had "major hearing loss." Swanson asked her to try on a pair of headphones which would demonstrate how well she would be able to hear with the \$2,190 hearing aids. He put the headphones on her head and began speaking to her. He also walked down the hallway continuing to speak saying "Do you hear me?" "See how well you can hear me now."

The three hearing aid professionals with whom I consulted said that the hearing test where the patient is asked to repeat words should be conducted under headphones so that the patient's ability to hear the words at different sound levels can be measured and noted. The test where Swanson walked down the hallway saying "Do you hear me?" "See how well you can hear me now" was probably performed by turning up the headphone volume to a very high level which would have been painful to the patient if any sounds had been made near to the patient. Tests using headphones should be used to measure the patient's ability to hear at different volume level. If the tester walks away from the testing equipment, he cannot see the decibel meter in order to log the patient's responses at the different sound levels. Finally, such a test does not simulate how a hearing aid would sound.

Swanson told Jackson that she could work off the cost of the hearing aids by doing some filing at his office 1-2 days per month for \$8.00 per hour. Swanson told her to speak to Jennifer about arranging work hours. At Swanson's request, Jackson left a left the down payment of \$400.00 on her credit card. Scott Swanson filled out the sales contract. Although Jackson was told that the hearing aids would be ready in 10 days, she had to make numerous telephone calls to Advanced Instruments but the hearing aids were not ready until March 14, 1997.

The hearing aids were too large and the batteries kept falling out. After a few days Jackson developed a rash in both ears. Although Swanson had told her that these aids had self adjusting



volume controls so she would not have to remove the aids to adjust the volume controls. The aids Swanson provided did not adjust themselves as promised by Swanson.

On March 28, 1997, Jackson returned to Advanced Instruments to try to get the problems with her hearing aids solved. Suzanne Unger worked on the aids by filing them down and cleaning them. She left that day with the same pair of hearing aids. She continued to have problems with her hearing aids so on April 3, 1997, she went back to Advanced Instruments and was fitted by Suzanne Unger for another pair of hearing aids. She was told that it would be another 10 days for the next aid to arrive. After 10 days had passed, she called several times and got no answer as to when her aid would be in.

On approximately May 5, 1997, Ms. Jackson received a telephone call from Jennifer who said her hearing aids were in and that she should come immediately to pick them up. Jackson told her that she did not want them. Jennifer told her that she would have someone call me back. On May 12 or 13, 1997 when no one had called her back, she talked to Jennifer again and asked for her money back. Jennifer again told her that someone would call her back. Again, no one from Advanced Instruments called her back about her request for a refund. She did receive two bills from Medi-Cash, the finance company that Swanson had arranged to finance Jackson's hearing aid purchase. The company wanted two payments of \$60.00 and charged 21% interest. When Jackson explained that Advanced Instruments still had the hearing aids, the person who called from Medi-cash, told Jackson that "The only reason you don't have the hearing aids is because you keep taking them back." Jackson had not told the Medi-cash representative anything about her problems with the hearing aids or that they had been returned.

On May 23, 1997, Jackson received a letter dated May 20, 1997 from Jennifer Lorenzo, who used the title "owner" of Advanced Instruments. In the letter, Lorenzo told Jackson that she was not entitled to a refund because she had not allowed "three remakes for a given problem..." The letter also told Jackson to come pick up her hearing aids.

On Friday June 13, 1997, Inspector Marian Terrell of the Alameda County District Attorney's Office accompanied Ms. Jackson to her appointment at Advanced Instruments to pick up her hearing aids. With Ms. Jackson's permission, Inspector Terrell posed as Ms. Jackson's daughter. After checking in with Jennifer Lorenzo, Jackson was seen by the only licensed dispenser now working at Advanced Instruments, David Parks. Parks made some adjustments to the volume in both ears. Parks made the same representations about the hearing aids that Swanson had previously made. Both represented that the hearing aids were self adjusting and explained that meant that they would boost the volume of soft sounds and lower the volume of loud sounds.

Also on Friday June 13, 1997 Lorenzo told Inspector Terrell that Scott Swanson works as a part time consultant. He helps her run the business, answers the questions that she can't answer and conducts some word tests such as the ones Swanson performed with Ms. Jackson, as part of his consultation.

On July 7, 1997, Marian Terrell again called Jennifer Lorenzo and asked to schedule the follow up appointment suggested by both Lorenzo and Parks on her previous visit with Mrs. Jackson. Terrell

told Lorenzo that her mother was still having trouble with the hearing aids and requested an appointment with Lorenzo's consultant. Lorenzo said that the consultant only works about 10 hours per month would not be available for a several weeks because he was about to go out of town again. Lorenzo said that she could not schedule the appointment ahead of time because she did not know what the consultant's schedule would be. (According to employee Cheryl Goddard, Swanson was scheduled and did work in the office during the week of July 14, 1997, the week following Inspector Terrell's phone call.) Inspector Terrell told Lorenzo that she would call back again to schedule an appointment.

On July 14, 1997, I took Rosalee Jackson to Pacific Coast Labs in order to test whether her hearing aids were "self adjusting" as represented by Swanson at the time he sold them to her. Mr. Norm Schlaegel ran a test on the hearing aids and determined that they were not "self adjusting." Schlaegel stated that self adjusting hearing aids would bring down the loud sounds and bring up the low sounds but that Jackson's aids did not do this.

2. John Guerra 84 years old [February 1997]

Guerra saw an advertisement in the Daily Review within 2 -3 weeks before February 17, 1997. He remembers that the advertisement stated that he could get a hearing aid for in the range of \$265. He tore the advertisement out of the paper and brought it with him to the Advanced instruments office in San Leandro on Feb. 17, 1997. He told the receptionist whom he described as a young oriental woman, a description which fits Jennifer Lorenzo, that he wanted to purchase the hearing aid in the advertisement. She showed the advertisement to Scott Swanson and Swanson said "we will honor that." She told Guerra that he could not buy an aid without a hearing test and she made an appointment for him to come back the following day, Tuesday February 18, 1997.

Mr. Guerra returned the following day for his appointment. A hearing test was administered to him by a woman. After the test, the woman asked him what price range of hearing aids he was interested in and she mentioned two ranges. Guerra responded that he was interested in the "best." The woman who administered the tests then lead him back out to the waiting room. Scott Swanson then came to the waiting room and lead Mr. Guerra to another room where he told Guerra that the price of the hearing aids would be \$4,400.00. Mr. Guerra said that Swanson was very insistent that he buy the hearing aids "now" even though Guerra told Swanson that he needed time to think about the purchase. Guerra said that Swanson kept trying to sell him the aids for about ten minutes. During this time Swanson made statements such as: "Are you ready to sign for it?" "You have to do it now." "You will be saving money by buying it now." This is the best hearing aid available. There will be no noise with this hearing aid. Guerra says that Swanson insisted that the sale be completed at least a dozen times. Guerra says that Swanson asked to him if he had a gold card. Guerra said that he did. Swanson asked him if he could see it. Guerra handed Swanson his VISA gold credit card. Swanson left the room for a few minutes while another woman talked to Guerra and told him that he should make his decision. Swanson returned and handed the credit card back to Guerra. Guerra was never shown any hearing aids including the ones which cost \$4,400. The hearing aids which he had seen advertised for \$239 were never discussed and were never shown to him. No ear mold impressions were taken. Mr. Guerra wanted to get out of the office so he told Swanson that he would come back

the next day with his decision about buying the hearing aids. Mr. Guerra was not given any paper work and did not sign any documents or credit card charge slips while at the office of Scott Swanson.

The following day, Mr. Guerra called Wells Fargo Bank because he became concerned about having shown Swanson his credit card the previous day. Guerra was informed that his card had been charged for \$4,400. Guerra went to another hearing aid dispenser, John Diles, in the San Leandro area whose name he obtained through the phone book. Diles called the police. Sgt. Marchetti from the San Leandro police department met with Mr. Guerra at John Diles' office and took a police report. Sgt. Marchetti accompanied Mr. Guerra to Advanced Instruments where he asked the receptionist for a refund for Mr. Guerra. The receptionist issued two credit card refunds, one for \$4,000 and one for \$400.

3. Elsie Doupont 89 years old [February 1997]

In February 1997, Mrs. Doupont received a flyer in the mail from Advanced Instruments, San Leandro. She remembers that the flyer had a picture of a hearing aid on it. She made an appointment for February 18, 1997. Scott Swanson told Mrs. Doupont that she had lost more hearing since the 1994 when he had previously sold her a pair of hearing aids for \$2,200.00. Swanson told Mrs. Doupont that he had a new style of hearing aid that would enable her to understand speech. He guaranteed an improvement. The hearing aids he offered cost \$5,200 but he offered to give her a credit of \$1200 for her old hearing aids bringing the total price to \$4,000. Mrs. Doupont told Swanson that she needed to think it over after hearing the price. Swanson told her that she had to decide "now." She next told him that she did not have her check book. After making Doupont sign the sales contract at his office, Swanson then drove Mrs. Doupont to her house so that she could write the check. While at Mrs. Doupont's home, Mrs. Doupont called her daughter, Jean Beiriger and asked her to speak to Swanson. Swanson told Beiriger that the hearing aid he intended to sell to her mother would restore her hearing to 95%. Beiriger told her mother to go ahead with the purchase if she could afford it. After Swanson left with the \$4,000 check, Mrs. Doupont got out her bank statement and examined it under a bright light with a magnifying glass because her eyesight is very poor. She discovered that instead of \$5,000 which she thought was in her account, there was only \$3,000. She became alarmed and called Swanson the next day to cancel the contract because she did not have the money. Swanson told Mrs. Doupont that she could pay \$3,000 now and make monthly payments for 6 - 12 months. She felt pressured and told him that she could not make a decision at that moment but would call back. The following day, she called again. Swanson told her that she could not back out of the contract. Later that day, Doupont's daughter informed her that she had 48 hours to cancel the contract. Doupont called Swanson's office at 6 pm and left a message stating that she was cancelling the contract because she believed she had 48 hours under California law. within 15 minutes, Scott Swanson called her back and yelled at her saying things like "What are you trying to do to me" "I have a business to run" "I thought your were my friend." "If you tell anyone anything bad about Advanced Instruments, I will have my lawyer sue you." Mrs. Doupont started crying and called her daughter and told her what happened.

The following day, Joan Beiriger, Mrs. Doupont's daughter called Advanced Instruments and spoke to Jennifer Lorenzo. Lorenzo told Beiriger that Doupont would not have to pay. Later Scott

Swanson called Beiriger and told her that if he was not paid at least a 15% surcharge, he would sue Mrs. Doupont. Beiriger told him that they did not owe a 15% surcharge. Swanson then offered to let Doupont out of the contract if both she and Doupont would sign an agreement not to complaint to any consumer or police agency. He told Beiriger that if he heard that Doupont had talked to any of his customers about her experience with Scott or Advanced Instruments he would sue her. Beiriger called Jennifer Lorenzo to discuss her earlier statement that Doupont would not have to pay. Lorenzo put her on hold and was hostile when she came back on the line saying that Scott has already handled the problem and that she had no more time to talk because she had appointments scheduled every 15 minutes.

Within a few days, Elsie Doupont received a letter in the mail dated February 21, 1997 with blank lines for Elsie Doupont and Joan Beiriger to sign. The form was resigned by Jennifer Lorenzo "Owner." In the letter Lorenzo agreed to "rescind your contract" ... "as long as you have not called and spoken to, complained, filed formal complaint with any agency or consumer protection group." Also the letter stated: "I further agree...that I will not discuss this matter with any client or prospective client competitor or physician." Neither Doupont or Beiriger signed the letter as they had successfully stopped payment on Doupont's \$4,000 check. The original letter signed by Jennifer Lorenzo is now in the custody of the District Attorney's Office.

Doupont has since gone to Kaiser for an ear exam which according to Beiriger revealed that she has an almost complete inability to hear out of one of her ears which could not be corrected even with hearing aids.

1996:

4. Jane Rousch 73 years old [Jan. 1996]

Mrs. Rousch brought the Advanced Instruments advertisement into Swanson in January 1996 and asked for the hearing aids costing \$238. Swanson told her that she could not wear the aids in the ad. Swanson sold her a pair of Innovative FMC hearing aids which cost \$1,999.00. She could not wear them outdoors or in movie theaters because the sound was too loud. They were also uncomfortable. She complained about the hearing aids twice but Swanson became very rude and refused to refund her money. He did not make new ear molds and did not make any adjustment to the aids.

5. Lou Filipovich 77 years old [Feb. 1996]

On December 13, 1995 and on February 12, 1996, Mr. Filipovich was sold two Innovaid FMC hearing aids at a cost of \$1,999.00. He says that he has constantly complained about the hearing aids. He has received some adjustments but his problems with his hearing aids were not resolved. He states that Swanson promised him that his satisfaction was guaranteed and gave him a money back guarantee. Mr. Filipovich states that his hearing aids are "worthless" one can only be used part time and the other one is not useable at all. Swanson has not refunded his money.

Mr. Filipovich was contacted on August 5, 1997 and he told me that he is still going back to Advanced Instruments attempting to get the hearing aids adjusted so he can use them. He said that his last visit was in May or June of 1997. He said that he would kept taking them back as he could

not afford to take Scott Swanson to Court and Mr. Swanson told him this would be the only way he would get his money back. Mr. Filipovich went to Advanced Instruments because of the ad for the Innovaid 600 which was advertised for a couple of hundred dollars. He was then talked into the purchase of hearing aids for \$1,990.00 by Mr. Swanson. Mr. Filipovich was led to believe that he would get his money back if he was not happy with the hearing aids. He has attempted many times to get a refund but has been refused each time.

6. David Smith 69 years old [June 1996]

On June 18, 1996, Mr. Smith bought a pair of hearing aids which cost \$3,800. After having problems with the sound quality and soreness in his ears for four weeks, he complained to Scott Swanson and asked for a refund. Swanson became angry and told him that he would not "eat the cost" and that he would take Mr. Smith to court. Mr. Smith said that both he and his wife were very upset by this incident and did not want to cause trouble. As a result, he still has the hearing aids which he cannot wear.

7. Constance Lunardi 79 years old [July 1996]

On July 3, 1996 Scott Swanson sold Mrs. Lunardi a pair of Innovaid Power Tymanet hearing aids for \$2,000. He took her old hearing aids and was supposed to give her \$1,000 trade in credit. He only gave her \$500 credit saying that the other \$500 covered the cost of his time and the fitting of the hearing aid. When she complained at least twice about the fit of her hearing aids, she was told that she did not know how to insert the hearing aids. Mrs. Lunardi believes that this was false since she had successfully worn hearing aids for the previous 20 years. During one fitting, the inside of her ear was scratched causing her to have to see an ear physician.

8. Veronica Russell 83 years old [July 1996]

In July 1996 Mrs. Russell says she was prompted to visit Advanced Instruments by an advertisement in the Daily Review newspaper which she remembered showing hearing aids selling for \$100 - 150. She says that she was lead to believe that she misunderstood the advertisement and was sold a pair of Innovative FCC hearing aids which cost \$925.99 each after a "discount" of \$200 was given to her. She financed most of the cost of the hearing aids through Medi Cash at the urging of Scott Swanson. She says that she really did not want to sign the papers but they made her feel incompetent. She had difficulty getting the hearing aids in and within a few weeks the battery door broke on one of the aids. It was sent back to the factory for repairs but the hearing aids still gave her the same problems as before. Swanson told her that she wasn't trying to like her hearing aids and refused to give her a refund.

9. Margaret Cleaves 84 years old [Aug. 1996]

Mrs. Cleaves went to Advanced Instruments on August 26, 1996 because of the newspaper advertisement. She was sold two Lori CIC hearing aids at a cost of \$3,500. She could not insert the right hearing aid and even after adjustments were made, she had problems with the sound quality and problems with the aids making loud noises which she says "anyone near me can hear them." She complained to HADEC because she felt the price was not as advertised and because she is left

with hearing aids which make so much noise she cannot wear them for long period of time. Mrs. Cleaves was contacted on August 1, 1997 and stated that she went to Advanced Instruments because of the ad in the paper. She did not recall the price in the ad but was sold two hearing aids for \$3,500.00. She said they never worked right and they made her ears sore and the "noise drives me crazy". Mrs. Cleaves said the hearing aid would stop working after having it in her ear for one hour. She took them back three times then asked for her money back. She was told that she would have to take them to court if she wanted her money back.

1995:

10. Frank C. Fernandez 91 years old [March 1995] deceased

On March 3, 1995, Mr. Fernandez was sold a pair of Innovative hearing aids. He returned three times over the next 9 months complaining that the hearing aids did nothing to clarify speech. Each time, Swanson told him that he had to wear them longer to get used to them. On April 4, 1996, when he requested a refund, Swanson tried to sell him new hearing aids for \$4,000 and offered him a refund of \$1,000 for his current hearing aids. Mr. Fernandez refused. Mr. Fernandez called repeatedly about getting a refund, but Swanson refused to answer his calls. Swanson returned one call and told Fernandez to sue him. On September 10, 1996, Mr. Fernandez and his son-in-law went back to talk to Scott Swanson about a refund, but Swanson was very rude and left the office refusing to speak to them.

11. Jesse Reyes 53 years old [March 1995]

On March 27, 1995, Mr. Reyes went to Scott Swanson's office in response to an advertisement he had seen showing hearing aids for \$239. He sent a copy of the advertisement with his complaint to HADEC. Swanson sold Mr. Reyes two Innovaaid Innpant hearing aids for \$3500. Reyes told Swanson that he needed to be able to hear better in crowded room restaurants and at his work around noisy machinery. Swanson told him that he would not have any problems in a noisy environment and presented a demonstration by some instruments on his desk while talking. After two weeks, Mr. Reyes returned to Swanson and told him that the aids had not improved his hearing in noisy environments and gave him headaches. Mr. Reyes tried to return the hearing aids but was told that he would sue Mr. Reyes in small claims court if Reyes did not allow him to try to adjust the hearing aids. Reyes allowed Swanson to make some adjustments. After two more weeks with no improvement, Mr. Reyes called the California Association of Hearing Aid Specialists to ask about his right to return the assistive device. He again returned to Swanson for the third time and reported that he had no improvement. Again Swanson made some adjustments. Again there was no improvement. After one week, Mr. Reyes called Swanson and told him that not only did he still have headaches and could not hear better but he now had an ear ache. Mr. Reyes returned for a fourth time and Swanson told Mr. Reyes that he was fitting him with different electronics. There still was no any improvement and now there was a buzzing or humming in both of his ears. Swanson told Mr. Reyes to come in for more adjustments. Mr. Swanson also told Mr. Reyes that he (Mr. Swanson) felt that the hearing aids had improved Mr. Reyes hearing. Mr. Reyes believed

that Swanson would keep putting him through a cycle of endless adjustments rather than ever refund his money. Mr. Reyes returned the hearing aids by registered mail with a letter requesting a refund. Mr. Swanson never has refunded his money.

12. Elsie Kirkland 75 year old [April 1995]

On April 27, 1995, she was given a hearing test by Scott Swanson. She purchased Innovaid Innplant hearing aids. When the hearing aid was initially placed in her right ear, Swanson tore the canal. After waiting for it to heal. She again tried to get her aids fit. She had to return several times for adjustments, including factory repairs "many times." Swanson refused to refund her money and instead kept making her return for more refittings. Finally she filed her complaint in October 1996 when her aids still were not improving her hearing.

13. Frank Greer [May 1995]

On May 16, 1995 Mr. Greer bought two Innovaid Innplant hearing aids from Scott Swanson. He had previously seen an advertisement in the Daily Review newspaper for hearing aids costing \$239. He returned twice for problems he was having with feedback. New impressions were taken and the hearing aid were refitted. Over the two to three weeks after his purchase, he realized that in addition to the feedback problems, there were also fit and sound quality problems with the hearing aids. Swanson told him that these problems would go away in time but could not tell him what that time period would be. Swanson also told him that he had unusual bone structure. When Greer asked for a refund, Swanson told him that he would not give him a refund since the "warranty had expired." [Complaint received directly by the District Attorney's Office.]

14. Leonard J. Perme 79 years old [Sept. 1995]

Mr. Perme made a September 29, 1995 appointment with Advanced Instruments after seeing their advertisement in the newspaper. Scott Swanson convinced Mr. Perme that he needed to purchase two Innovaid Innplant hearing aids for \$4,000. He gave them a discount of \$500 plus did not charge them any sales tax. The hearing aids made "buzzing" noises. Mr. Perme brought them back several times for adjustments. Once the batteries were changed and two other times he was told that the aids had been sent back to the factory. None of these adjustments improved the quality of the hearing aids. He had several arguments with Swanson. He was refused a refund when he requested it. Mr. Perme was contacted on August 6, 1997 and he said that he went to Advanced Instruments because of the ad in the paper for a hearing aid for \$239.00. He was never shown this aid and sold hearing aids for \$ 4,000.00. He was pressured into the purchase by being told that the hearing aids would be discounted \$500.00 if he made purchase that day. He said that one of the hearing aids is still not working.

15. Donald Keith Mac Dougal 76 years old [Dec. 1995]

On July 26, 1996, Mr. MacDougal testified in the case HADEC v. SWANSON (Volume IV July 26, 1996 RT 5 - 22 and 30). In December 1992 he first purchased two hearing aids from Scott Swanson for \$1999. In June 1995 he had to take one of them back because the on and off switch was not working. That problem was fixed successfully. On Dec. 29, 1995 he again returned to Swanson

because his left hearing aid was not working. Swanson told him about a new type of hearing aid the CIC (completely in the canal) which Swanson explained would give superior hearing performance. MacDougal He bought the hearing aid that day for \$1750 because Swanson said the applicable discount would expire at the end of the month and that he would extend the warranty by one year. MacDougal picked up the aid in Jan 1996 but went back about two weeks later telling Swanson that the hearing aid hurt ear and that he could not hear well with it. Swanson sent him away for 3 - 4 hours with volume turned up. MacDougal came back and reported that it still hurt his ear. Swanson sent it back to the factory for a remake. When MacDougal returned for his hearing aid on Feb. 6, 1996, he tried to confirm with Swanson what he had been told earlier about the superior qualities of the hearing aid. Swanson started yelling at MacDougal and accused him of blaming him for his hearing loss. Swanson denied that he had made certain claims about the qualities of the new hearing aid. Swanson ordered MacDougal to leave his office until he apologized to him. MacDougal testified that he felt threatened, bewildered and intimidated. He left without his hearing aid. Later he asked for a refund but Scott told him "I can't do that." MacDougal went to an ear doctor who referred him to a hearing aid specialist who told him that the CIC aid was not appropriate for him. MacDougal took Swanson to small claims court and received a judgment for \$1,237.50 which remains unpaid. Swanson appeared for the small claims court hearing wearing a white lab coat. Mac Dougal testified that he was "hornswoggled in the purchase of this hearing aid when the other one was working satisfactorily. It hurt my ear and certainly didn't perform like it was described on the December 29, 1995 date."

16. George Scism 76 years old [1995, month unknown]

Originally bought hearing aids from Scott Swanson in 1989. In 1990, Swanson contacted him and told him that he needed new hearing aids very badly. He went to the Advanced Instruments office where Scott administered a test. Swanson brought Scism's wife in another room and asked him to repeat a series of words. Scism believed that he heard the words well enough, but Swanson used the test to try to convince him that he needed new hearing aids. Scism left without purchasing hearing aids. In 1995, one of the hearing aids broke and Mr. Scism brought it to Swanson for repair. Scott Swanson told Scism that the State of California would not allow him to make a repair but that if Scism left it with Swanson he would try to fix it anyway. Scism came back for the hearing aid to find that Swanson had completely destroyed the hearing aid. Swanson handed him back the pieces in a plastic bag. Swanson told Scism that he needed a new hearing aid. Scism was so upset with Swanson that he challenged him to come with him out into the street and settle the matter "man to man." Scism's wife intervened and no physical altercation occurred. Mr. Scism later apologized for challenging Swanson to a fight. Since that time, Swanson has regularly called Scism's home to try to convince him to buy a new hearing aid. The most recent of these calls occurred earlier this year, in 1997. Scism had read that Swanson's license had been revoked in 1996 and believed that Swanson was no longer in the hearing aid business. When he received the phone call this year, he told Swanson that he had purchased hearing aids elsewhere.

17. William Duffey 90 years old [1995 or 1996; complainant is uncertain about the year]

Mr. Duffy went to Advanced Instruments after seeing an advertisement in his local San Leandro



newspaper in 1995 or 1996. Although Mr. Duffy believed that he only needed a hearing aid in one ear, Swanson told him that one hearing aid would not help his problem. Mr. Duffy asked for the hearing aids which he had seen in the newspaper which believed cost \$263. (The advertisements have always advertised one type of hearing aid, the Innovaid 600, at a cost of \$239.) After being told by Scott Swanson that those hearing aids did not apply to him, Swanson sold him two hearing aids costing \$2,000. Mr. Duffy returned four times because the hearing aids were not working right. Swanson told him that he sent the aids back to the factory once. Duffy found that there was no change in the quality of the hearing aids after they had supposedly been sent back to the factory. Mr. Duffy then went to an ear doctor, Dr. Rubenstein, who fitted him for a single hearing aid costing \$800, which was appropriate for his hearing problem. Mr. Duffy is happy with the fit and sound quality which he got from the \$800 hearing aid.

I contacted Dr. Rubenstein who told me that the ads put in the paper by Advanced Instruments was a clearly a "Bait and Switch" as the Innovaid 600 has little use. He also stated the ads are misleading as to the INNPLANT by Innovaid. Dr. Rubenstein also gave me the name of Rodrigo Alvernaz as a patient of his that had an ear disease and was sold a hearing aid by Mr. Swanson. He said that the hearing aid should not have been fitted to Mr. Alvernaz as the disease causes changes in his hearing.

18. Frank Feldman 83 years old Dec. 1995]

Mr. Feldman wrote to both the Alameda County District Attorney's Office and to the HADEC in January 1996. He sent copies of several Advanced Instruments Advertisement from the Alameda Newspaper Group TV book. These advertisement appeared late December 1995 through January 6, 1996. He states that the advertisement is deceptive because Scott Swanson never showed the complainant the hearing aid depicted in the advertisement. While making an ear mold, Swanson perforated the complainant's ear drum and the complainant had to see an ear doctor. The hearing aids which the complainant bought from Swanson cost \$3400. The complainant says that Mr. Swanson is very high pressure." Mr. Feldman was able to get his deposit back when he confronted Scott Swanson.

Mr. Feldman was contacted by the phone number on his complaint letter. He stated that Mr. Swanson gave him his money back only because he had damaged his ear drum while making a mold. He said that he was told he had a mild hearing loss and went to Advanced Instruments when he saw the ad for the Innovaid 600 which was described for mild hearing loss. He felt he was pressured into making the purchase of two hearing aids for \$3,400.00.

1994:

19. Rodrigo Alvarez 60 years old [May 1994]

Mr. Alvarez submitted a complaint form to the HADEC and also testified in the license revocation hearing HADEC v. Scott Swanson Action no 1C-93-30768 Mr. Alvarez' testimony is contained in Reporter's Transcript volume II or V pages 5 - 47 from July 23, 1996. He testified that in 1993 he saw the Advanced Instruments advertisement in the Daily Review in Hayward. The advertisement was for a \$239 hearing aid. When Mr. Alvarez mentioned the hearing aid in the advertisement to Swanson, Swanson told him that device would not be appropriate for him. On January 11, 1993, Scott Swanson fitted Alvarez with a hearing aid in his right ear. The hearing aid had to be returned

three different times over then next four to five months because it had a problem with whistling and did not work properly. Later in 1993, Mr. Alvarez was diagnosed with Menier's disease which causes a fluctuation in the ability to hear sound.

In May of 1994, Mr. Alvarez received a telephone call from a woman at Advanced Instruments who told Alvarez that she worked with Scott Swanson. She told him that for three days they were having a specialist come to their office who had state of the art equipment. She told him that this specialist could probably fit him with a hearing aid which would work better for him than the one he had. Mr. Alvarez also received some advertising material in the mail to the same effect as the telephone call. Mr. Alvarez was tested and was sold a pair of hearing aids which cost \$5,990 by Scott Swanson on May 10, 1994. Mr. Alvarez informed Mr. Swanson about his diagnoses of Menier's disease and wrote it on his patient in-take form. (Swanson admits that he knew about Mr. Alvarez' diagnosis of Menier's disease. Volume III July 24, 1996, pg 163) Mr. Alvarez was told that he could receive a one day only discount of \$2,000 if he signed the contract that day. Between signing the sales contract with Swanson and before he picked up his hearing aids, on May 23, 1994, Mr. Alvarez had an appointment with an ear doctor. The doctor told him that he should not be fitted with a hearing aid until the fluctuation in his hearing became stable. The doctor also told Alvarez that the type of hearing aid selected by Swanson was inappropriate because it had a simple on-off switch rather than a volume control which Mr. Alvarez could adjust according to his hearing fluctuations. Mr. Alvarez called Advanced Instruments and told the receptionist that he was cancelling his order and told her what his ear doctor had told him. He followed this telephone call with a letter. On July 18, 1994, Scott Swanson left a message on his answering machine accusing Mr. Alvarez of playing a game and threatening to take him to court. In November 1994, Mr. Alvarez received a notice that Mr. Swanson was suing him. In December 1995, the Hon Leo Dorado heard Mr. Swanson's small claims court action and denied Swanson's claim. In July 1995, after taking two medications, his own doctor finally felt he was ready to be fitted with hearing aids.

20. Robert D. Asher 75 years old [Oct. 1994]

Mr. Asher purchased Innoaid FRC hearing aids from Scott Swanson on January 14, 1994. Swanson relied on a 1988 hearing test performed by Kaiser which Mr. Asher brought in to Swanson. Swanson never did a hearing evaluation before selling hearing aids to Mr. Asher. After several months of complaints to Swanson about continuous howling in both hearing aids and inadequate amplification, Mr. Asher requested that Swanson perform a hearing test showing his hearing profile with and without the hearing aids. Swanson told Mr. Asher that no audiologists gave comparison tests and refused to administer the tests. Mr. Asher had comparison tests done at Kaiser in October 1994 and brought this test back to Swanson. Asher says that Swanson "hit the ceiling" and threatened to "deck" him if he mentioned the name Kaiser again. Mr. Asher made one more attempt to get his hearing aids adjusted properly at Advanced Instruments in 1995 but was unsuccessful. He was told that he had too much wax in his ears for Swanson to adjust his hearing aids. Instead Swanson put Vaseline on the aids to make them adhere to his ear canals. Mr. Asher has not returned to Advanced Instruments since that time and is now completely unable to use the left hearing aid.

21. John Wolf 87 years old [October 1994]

In October 1994 John Wolf was introduced to Scott Swanson by Swanson's father who said that Scott would give Mr. Wolf a good deal on a hearing aid. Mr. Wolf needed one hearing aid to replace one of his two hearing aids. Swanson told Wolf that he needed two new hearing aids from Innovaid because they represented a new advance in hearing aid science and because they were the best in their class. Swanson told Wolf that his remaining good hearing aid was obsolete. Swanson also told Wolf that he could not get the Innovaid hearing aids anywhere else but through him. He purchased two Innovaid FMC hearing aids for \$1,861.50 based on these representations. Wolf had many problems with the hearing aids falling out of his ears and with the volume controls. He had to return them for adjustments. Wolf called several other hearing aid dispensers including John Diles in San Leandro and discovered that the hearing aids he purchased from Swanson were available through any dealer and should sell for around \$650.00 each. Wolf also had one of the other dispenser examine his old hearing aid which the dispenser determined was not "obsolete." Wolf requested a refund from Swanson. Swanson refused, but then offered to let him cancel his sale if he agreed to pay a \$390 "impression fee." Mr. Wolf called the Hearing Aid Dispenser's Committee and he says he was told that impression fees are usually around \$100.00. Wolf returned the Innovaid hearing aids to Swanson and offered to pay \$100.00. Swanson responded by suing Mr. Wolf in small claims court. Mr. Wolf won the small claims court case minus a deposit fee which the judge awarded to Swanson. (Wolf submitted complaints to HADEC, to the District Attorney's Office and testified in the case HADEC v. Swanson, RT vol. I, pgs 94 - 128 July 22, 1996)

22. Vivian Dragoo Estrada 76 years old [Oct. 1994]

Mrs. Estrada walked to her appointment on October 26, 1994 at Advanced Instruments. Scott Swanson demanded full payment immediately for one Innovaid FCC hearing aid which he sold her the same day. She said he pressured her to buy two hearing aids but she could not afford to do so. She has very poor vision and could not read the forms which she says were "pushed" at her. She says that she felt panic and had to get out of here in a hurry. The day after she picked up her hearing aid, she called the "hearing aid firm" to complain about painful loud sounds at the grocery store such as a child screaming and was "laughed at." She was told that pain was routine and that it would be gone within a few hours. Within a few weeks she experienced "horrible exaggerate, painful ear skull and right eye pain." She stated that she was ridiculed when she called to complain. She says at first it was polite but after daily calls she was told it was her imagination and that she should try self hypnosis. She says that she went to Scott Swanson's office to buy ear plugs for \$40.00 but Scott "went into a temper tantrum and ordered me out of his office and not to return as I was just "too very crude." Her says that her hearing aid still amplifies sounds too much but she will not go back to Swanson even though she says that her hearing aid is still under his guarantee.

23. Ronald Siegel 50 years old [Oct. 1995]

Mr. Siegel went to Advanced Instruments after seeing ad in the newspaper for a hearing aid which he thinks cost \$125.00 after a credit for the \$100.00 discount coupon in the same ad. He had seen an Ear Doctor in the Modesto area who told him that he had some nerve damage and that a hearing aid might help. He went to Advanced Instruments and was told by Scott Swanson the hearing aids in the ad would not help him. Mr. Siegel decided to purchase C.I.C's at a cost of \$3,500.00 after being given a "Word Test" by Swanson. He said that Swanson tested him with and without the

hearing aids by asking him words as Swanson walked down the hall. Mr. Siegel now feels that this test was deceptive as he was in a quiet room when the test was done. Mr. Siegel had problems with the aids from the start as he was picking up too much background noise. He took them back four or five times and did not notice any difference. Scott told him that he would send them back to the factory for "Baffles" to increase the volume. He asked for a refund as they did not live up to Mr. Swanson promise to make his hearing 70% better. He also felt that he was misled by the ad in the paper. Mr. Siegel said that Scott yelled at him and told him that he would not get his money back. Siegel took Mr. Swanson to Court and the Court ordered Mr. Swanson to make the refund. Mr. Swanson appealed, but again the court ruled in Mr. Siegel favor. Mr. Swanson told Mr. Siegel that the two Judges did not know anything and that he would not pay the judgement. Mr. Siegel did get his money by having his lawyer attach Mr. Swanson's Bank Account.

### Storage of Business Records

During the undercover video surveillance conducted on June 13, 1997, by Inspector Marian Terrell in connection with the investigation of the Rosalee Jackson complaint, Inspector Terrell questioned Jennifer Lorenzo about the job offer to Mrs. Jackson. Lorenzo gave Inspector Terrell a tour around the office to show her where Mrs. Jackson would be working. As part of this tour, Lorenzo showed her the garage in back of the office building and told her that "old" files were kept there and at a storage facility nearby. I have checked the storage facilities in the area and have discovered that Innovaid Hearing Corp. and Scott Swanson have a storage locker located at Lockaway Storage located at 1100 Davis in San Leandro. I was told that storage locker C116 was rented to them, but they were locked out because they were behind in the rent. Ms. Picou stated that she had informed Swanson that if the rent was not paid by August 8, 1997 the lock would be cut and the property sold. On Friday Aug. 8, 1997, I again contacted Ms. Picou who told me that the property would be held until late next week (the week of Aug 11, 1997) as she had been promised a payment check for the overdue rent.

### Search of Automobiles:

California Department of Motor Vehicle Records show that the white 1994 Dodge Van, California license plate number 3KJG899, is registered to Deborah Harris who resides in Honolulu City, Hawaii. On the week of Aug. 4, 1997, I contacted Ms. Harris by telephone and she told me that she owns the van and that she is letting Scott Swanson use the van. Within the last three weeks, I observed the van parked in the driveway of the house at 111 Auburn St., San Rafael California, the home of Jennifer Lorenzo and Scott Swanson. On Aug. 4, 1997, I observed the van in the parking area of Advanced Instruments, at 370 East 14th. St, San Leandro. California Department of Motor


Vehicle records show that the red 1995 Honda, California license plate number 3KHG888 is registered to Jennifer Lorenzo. Over the last six weeks, I observed the 1995 red Honda parked in the parking area of Advanced Instruments, 370 East 14th. St. San Leandro on at least 6 occasions.

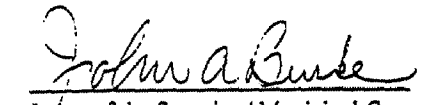
WHEREFORE, AFFIANT PRAYS FOR THE ISSUANCE OF A SEARCH WARRANT FOR THE SEIZURE OF SAID PROPERTY OR ANY PART THEREOF.

I swear under penalty of perjury that the foregoing is true and correct.

Dated this 11 day of Aug, 1997.

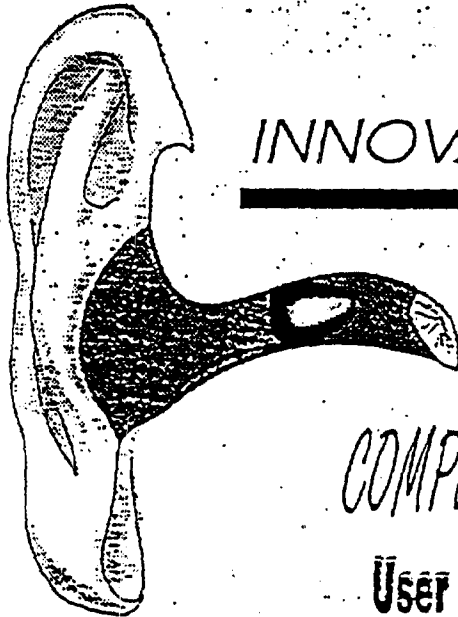
Subscribed and sworn before:

  
John E. Samuelson  
Inspector II

  
Judge of the Superior / Municipal Court

Dated this 11th day of Aug, 1997

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*COMPLETELY IN THE CANAL*

User installed and removed

No more Whistling

Use any phone

Fewer wax problems

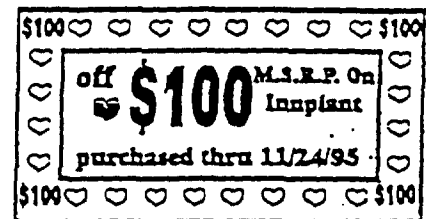
Use during sleep

Does not show

Won't fall out

Easier to remove

No volume - Wheel



For moderate to severe loss

## INNOVAID 600

NO BATTERIES!!!

NO MANUAL CONTROLS TO ADJUST!!!

The InnoVaid 600 non-electronic acoustic  
hearing aid, designed  
by Stanford University Professor Dr.  
Richard Goode - Inventor  
For mild hearing loss

**SALE! \$239**

For the InnoVaid 600

## ADVANCED INSTRUMENTS

## HEARING AID CENTER

370 East 14th St

San Leandro

**569-8377**

Submitted to HADEC by  
Tom Williams, Advanced Instr.  
Concord

**EXHIBIT A-1995**

**PATENT**

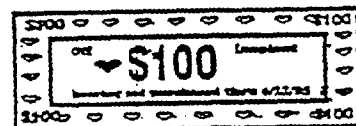
**REEL: 9453 FRAME: 0926**

# AMAZING NEW HEARING AIDS

INNOVAID® *INNPLANT!*™



No more Whistling. Does not show.  
Use any phone. Won't fall out.  
Fewer wax problems. Easy to remove.  
Use during sleep. No volume-wheel.  
For Moderate to Severe loss.



★ NO BATTERIES!!!  
★ NO MANUAL CONTROLS TO ADJUST!!!  
INNOVAID 600

The Innovaaid 600  
non-electronic  
acoustic hearing aid,  
designed for mild  
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Stanford University.

**SALE! \$239**

For the Innovaaid 600

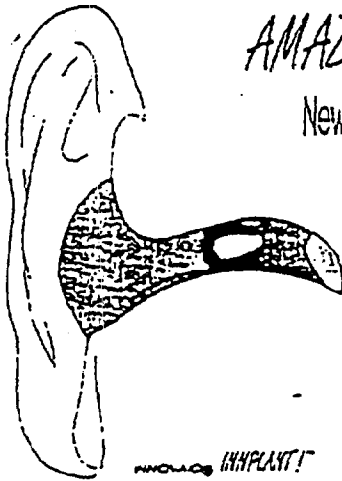
**ADVANCED INSTRUMENTS  
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SAN LEANDRO  
569-8277

Oakland Tribune  
submitted by John Wolf

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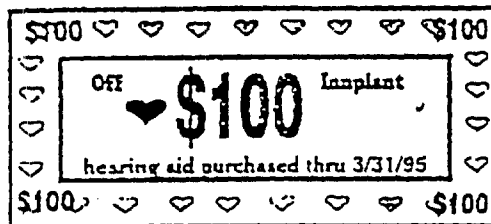


*AMAZING*

New Hearing Aid Fits

*COMPLETELY IN THE CANAL*

No more Whistling    Does not show  
Use any phone        Won't fall out  
Fewer wax problems    Easy to remove  
Use during sleep        No volume Wheel  
For Moderate to Severe loss



★ NO BATTERIES!!!  
★ NO MANUAL CONTROLS TO ADJUST!!!  
INNOVAID 600 I.N.E.



## ADVANCED INSTRUMENTS

370 EAST 14TH ST. SAN LEANDRO CA (510) 569-8377

Submitted by  
Jeannette McQuon  
Advanced Instrument,  
El Cerrito



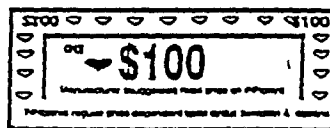
# AMAZING HEARING AIDS!

INNOVAID® *IMPLANT!*™



User Installed and removed

No Annoying Whistling Does Not Show  
Use Any Phone Won't Fall out  
Fewer Wax Problems Easier To Remove  
Use During Sleep No Volume Wheel  
For Moderate to Severe loss



OR  
INNOVAID 600

★ NO BATTERIES!!!

★ NO MANUAL CONTROLS TO ADJUST!!!

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non-electronic  
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designed for mild hearing loss  
by Stanford University  
Professor Dr. Richard Goode  
Inventor

SALE! \$239

For the Innoaid 600 - Regular price \$299

ADVANCED INSTRUMENTS  
HEARING AID CENTER

370 EAST 14TH  
SAN LEANDRO

569-8377

submitted by  
Michael Bailey  
Advanced Instruments  
San Mateo

EXHIBIT A-1096

REEL: 9453 FRAME: 0929



ASSOCIATED PRESS

LOS ANGELES — A judge said Monday she planned to sentence computer hacker Kevin Mitnick to 22 months in prison for his admitted use of stolen cellular phone numbers to dial into computer databases and for parole violations.

"I think more is in order, but this is what the law expressly describes. So that's what I'm going to give him," U.S. District Judge Mariana Pfaelzer said in court.

Mitnick is to be formally sentenced on Monday. Pfaelzer said

she planned to consider how much Mitnick should pay.

He was arrested in February 1995 in Raleigh, N.C., following an investigation and cross-country manhunt, with a trap sprung by Bay Area resident Tsutomu Shimomura, an expert in computer security.

Mitnick pleaded guilty last year to using 15 stolen cellular phone numbers to dial into computer databases in North Carolina. Mitnick consented to having the case moved to his home state of California.

## Four arrested in scientist's killing

ASSOCIATED PRESS

PALO ALTO— Police arrested two adults and two teenagers Monday on suspicion of beating a NASA scientist to death, a killing that shocked this affluent city with a low crime rate.

The four — believed to be gang members — were arrested in raids in the neighboring cities of East Palo Alto and Mountain View, police said.

The suspects were being looked for investigation in the murder of Herbert Kay. He was killed Friday on a downtown

street not far from his home and around the corner from the police station. Kay, 38, was a computer scientist at NASA Ames Research Center in Mountain View.

At a news conference, police declined to discuss motives or details of the investigation.

Authorities identified the two adult suspects as Ipeza Simanu, 20, of East Palo Alto, and Christian Valdez, 20, of Menlo Park. Police also arrested two juveniles, one 15 and one 17, both of East Palo Alto.

AS SEEN ON TV

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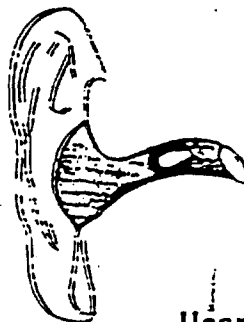
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Hearing Aid Fits

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USE ANY PHONE WON'T FALL OUT  
FEWER WAX PROBLEMS EASIER TO REMOVE  
USE DURING SLEEP NO VOLUME WHEEL  
FOR MODERATE TO SEVERE LOSS



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**SALE! \$239**

For the Innovaid 600 REG PRICE \$329

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SAN LEANDRO

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lead.

Union City extended its lead to 6-1 before Alpine answered in the fourth. Alex Saal led off with a double and moved to third on Ryan Plager's one-out single. Rex Finato stepped up and drilled the first pitch he saw over the left-field fence for a three-run homer to cut the Union City lead to 6-4.

"That was a little wake-up call," Morales said.

"When we first came out here, we thought it would be an easy game," Findley said. "We had to come out here with our heads in the game."

Union City tacked on five more runs in the last two innings and the game was called because of the 10-run rule.

Starting pitcher Tony Lourenco pitched well for three innings, giving up only one run on two hits and striking out six before giving up Finato's home run. Derrick Landavazo came in and went the rest of the way, giving up one run on one hit.

Alpine 100 301-5555  
Union City National 312 423-1558

THE DAILY REVIEW

## der, advance

for the win.

Max Ponce, who also went to Mt. Eden, went 3-for-3 with a double.

### Softball

The San Leandro Bobby Sox 9-12-year-old all-star team advanced to the Nationals by winning the division championship against the Blue Hills of Cupertino 13-6 last week in Salinas.

The Nationals are scheduled to take place Aug. 15-18 in Buena Park.

Brandi Vargas went 3-for-4 with three runs and three RBIs to lead San Leandro in the division championship. Twin sisters Kim and Kacy Krisman combined for three hits, including a double, and three RBIs.

Vanessa Castro and Tessa Feise each had two hits. Danielle Russo pitched the complete game and struck out five.

### Soccer

The Southern Alameda County Storm girls under-14 select team finished fourth last weekend at the California Cup tournament in Sacramento.

The Storm won its first three matches by a combined score of 7-1, but lost its final three by 3-0.

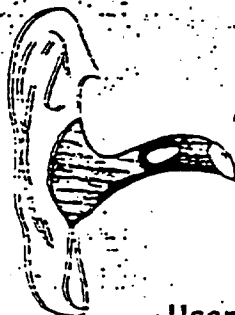
Kate Chadwick finished as the team's leading scorer with two goals. Javon Neal, Angelina Elora, Mika Valos, Shannon Maly and Vicki Quintana also scored.

Storm victories came against the Stockton Revolution, Elk Grove Fury and Crystal Valley Crossings.

THURSDAY, July 24, 1997

# AMAZING HEARING AIDS!

INNOVAID® INNPLANT!™



AMAZING

Hearing Aid Fits

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USE ANY PHONE. WON'T FALL OUT  
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USE DURING SLEEP NO VOLUME WHEEL  
FOR MODERATE TO SEVERE LOSS



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SALE! \$239

For the Innovaid 600 - REG PRICE \$279

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PATENT

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# AMAZING HEARING AIDS!

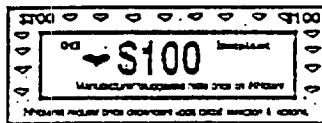
INNOVAID® *INNPLANT!*



User Installed and removed

- |                       |                  |
|-----------------------|------------------|
| No Annoying Whistling | Does Not Show    |
| Use Any Phone         | Won't Fall out   |
| Fewer Wax Problems    | Easier To Remove |
| Use During Sleep      | No Volume Wheel  |

For Moderate to Severe loss



OR  
**INNOVAID 600**

★ NO BATTERIES!!!

★ NO MANUAL CONTROLS TO ADJUST!!!

The innovaid 600  
non-electronic  
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by Stanford University  
Professor Dr. Richard Goode  
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Take-out Prices	ENTREES
SOUP	Baked Lasagna
Sauté w/ dressing	Meatballs (5 per order)
Sauce	Half Chicken w/ fries
Spaghetti w/ sauce	Chicken Liver Sauce
Rigatoni w/ sauce	Bread or Chicken w/ fries
Pasta w/ sauce	Chicken Lasagna w/ fries
Tomellini w/ sauce	Bread or Turkey Cutlets w/ fries
Cheese Tortellini sauce	Curties Alla Parmigiana w/ fries
Ravioli w/ sauce	Curties Alla Mafanese w/ fries
Vegetable Ris Season	Steak, Rib Eye 8oz cut w/ fries
Souffle	Steak, Rib Eye 10oz cut w/ fries
Garlic Bread	Steak, New York Cut 8oz cut w/ fries
Relish Plate Per Order	Steak, New York Cut 10oz cut w/ fries
Order of fries	Ground Steak w/ fries
Order of Grated Cheese	Calamari w/ fries
Order Portions: any Entree one person	Red Scampi w/ fries
Order Items: 3 people	Fillet of Sole w/ fries
Garlic Bread (1/2 loaf) 3 people	Prawns w/ fries
Whole Loaf - 6 people	Prawns & Scallops Combo w/ fries
	Scallops w/ fries
	Stuffed Prawns w/ fries
	Fillet of Salmon w/ fries

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# EXHIBIT B

PATENT  
REEL: 9453 FRAME: 0934

# AMAZING NEW HEARING AIDS!

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AMAZING

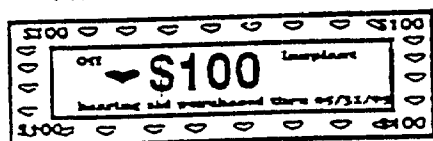
New Hearing Aid Fits



COMPLETELY IN THE CANAL

No more Whistling  
Use any phone  
Fewer wax problems  
Use during sleep  
For Moderate to Severe loss

Does not show  
Won't fall out  
Easy to remove  
No volume-wheel



★ NO BATTERIES!!!  
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INNOVAID 600

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**SALE! \$239**

for the innovaid 600

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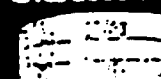


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### Take Out Prices

FOOD	PL	QT
Soup	.75	1.50
Salad w/dressing	1.00	1.95
Sauce	1.50	2.25
Spaghetti w/sauce	1.30	2.60
Rigatoni w/sauce	1.30	2.60
Fettucini w/sauce	1.30	2.60
Tortellini w/sauce	2.45	4.85
Ravioli w/sauce	2.45	4.85
Vegetable (in season)	1.00	1.95
Spumone, Vanilla, Sherbert	1.25	2.50
Garlic Bread	1.65	3.20
Relish plate (per order)		3.25
Order of Fries		1.45
Order of Grated Cheese		.75
Order Portions: Any entree - one person; Quart items - 3 people; Garlic Bread - (1/2 loaf) - 3 people; Whole loaf - 6 people.		

### Take Out Prices

ENTREES	
Baked Lasagna	3.15
Meatballs (5 per order)	2.25
Half Chicken w/rice	2.95
Chicken Liver Saute	2.75
Breast of Chicken w/rice	3.95
Chicken Cacciatore w/rice	3.95
Breast of Turkey Cutlets w/rice	3.95
Cutlets Ala Parmigiana w/rice	5.75
Cutlets Ala Milanese w/rice	5.75
Steak, Rib Eye w/rice	6.75
Steak, New York Cut w/rice	6.75
Ground Steak w/rice	2.95
Calamari w/rice	3.95
Filet of Sole w/rice	5.75
Prawns w/rice	6.35
Prawns & Scallions	6.50
Combination w/rice	5.75
Scallions w/rice	6.35
Stuffed Prawns	6.35

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**FOR VALUABLE CONSIDERATION**, Scott Swenson Enterprises, Inc., a California corporation ("Seller") hereby sells and conveys to Lori Medical Laboratories, Inc., a Minnesota corporation ("Buyer"), the personal property, whether tangible or intangible, owned by Seller, as listed on Exhibit A, hereto attached, free and clear of any and all liabilities, liens, claims and/or encumbrances.

Seller agrees that Seller is the owner of the personal property, whether tangible or intangible, as described above, that the personal property is free from all encumbrances and that the Seller has the right to sell and convey the personal property, whether tangible or intangible, to Buyer. Seller agrees to warrant and defend the sale of the personal property to Buyer against any and all persons who claim title to the personal property described above.

This Bill of Sale shall bind the Seller and benefit the Buyer and their successors and assigns.

Date: October 5 1987

SELLER:  
SCOTT SWANSON ENTERPRISES, INC.

取

~~Ismael D. Vazquez, President~~

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 1997.  
by \_\_\_\_\_, on behalf of the corporation.

**Notary Public**

**FD-302 (Rev. 4-15-64)**

**PATENT**  
**REEL: 9453 FRAME: 0936**



EXHIBIT A

Assets/Personal Property

Plain paper fax  
Computer - Pentium  
15" monitor  
Laser printer  
Copy machine  
Paper shredder  
CD-2 Audiometer  
Stetho hearing aid cleaner  
Computer Pentium  
Monitor 14" color  
Fonar portable real ear machine  
Computer 386 - mono monitor  
Sound booth  
Stetho w/ station  
Lab equipment  
Dental lathe  
Computer 386 - monitor 14" mono  
Mac computer  
20" color 2-page monitor  
Laser printer  
Scanner  
Furniture  
Customer list

As shown on video tape

IM

Jennifer L. Wright

PROCESSED